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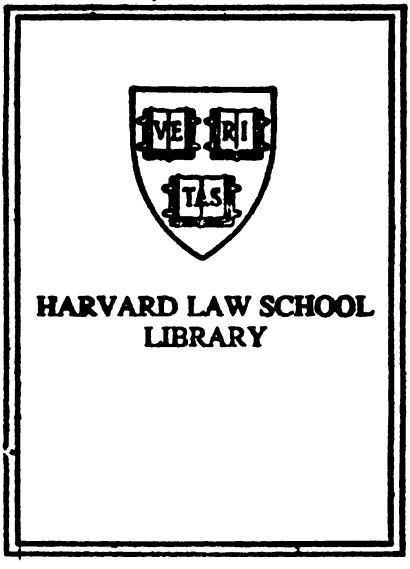

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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

DECEMBER 10, 1909, TO FEBRUARY 3, 1910

JAMES M. REASONER
STATE REPORTER

VOL. 159
FIRST EDITION

CHICAGO
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1910

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ROBERT M. MONTGOMERY,[2] GRAND RAPIDS, .	Dec. 31, 1911

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RECORDER'S COURT OF DETROIT,

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JUDICIAL CIRCUITS.

Counties.	Circuits.
Alcona	28
Alger	11
Allegan	20
Alpena	26
Antrim	13
Arenac	34
Baraga	12
Barry	5
Bay	18
Benzie	28
Berrien	2
Branch	15
Calhoun	37
Cass	36
Charlevoix	13
Cheboygan	33
Chippewa	11
Clare	21
Clinton	29
Crawford	34
Delta	25
Dickinson	25
Eaton	5
Emmet	33
Genesee	7
Gladwin	34
Gogebic	32
Grand Traverse	13
Gratiot	29
Hillsdale	1
Houghton	12
Huron	24
Ingham	30
Ionia	8
Iosco	23
Iron	25
Isabella	21
Jackson	4
Kalamazoo	9
Kalkaska	28
Kent	17
Keweenaw	12
Lake	19
Lapeer	6
Leelanaw	13
Lenawee	39
Livingston	35
Luce	11
Mackinac	33
Macomb	16
Manistee	19
Marquette	25
Mason	19
Mecosta	27
Menominee	25
Midland	21
Missaukee	28
Monroe	38
Montcalm	8
Montmorency	26
Muskegon	14
Newaygo	27
Oakland	6
Oceana	14
Ogemaw	34
Ontonagon	32
Osceola	19
Oscoda	28
Otsego	34
Ottawa	20
Presque Isle	26
Roscommon	34
Saginaw	10
St. Clair	31
St. Joseph	15
Sanilac	24
Schoolcraft	11
Shiawassee	35
Tuscola	24
Van Buren	36
Washtenaw	22
Wayne	3
Wexford	28

Digitized by Google

TABLE OF CASES REPORTED.

PAGE

Adams, De Boer *v.* 560
Adams & Ford Co. *v.* Cullen 669
Ainsworth *v.* Munoskong Hunting & Fishing Club. 61
Alger Circuit Judge, Boucha *v.* 610
Allen *v.* Pulfer 616
——— *v.* Wayne Circuit Judge 612
Alpena, *for use of* Beaudrie, *v.* Murray Co. 336
———, ——— Besser, *v.* Title Guaranty & Surety Co. 329
———, ——— O'Brien, *v.* Title Guaranty & Surety Co. 334
American Telephone & Telegraph Co. *v.* Secretary of State 195
Anderson, People *v.* 185
Andrews *v.* Lavery 26
——— *v.* Osborn 77
Ann Arbor Railroad Co., Moyer *v.* 645
Appeal of Hoek 180
Appeal of Look 108
Armour & Co. *v.* State Dairy and Food Commissioner 1
Ashton, Frohlich *v.* 265
Auditor General *v.* McCall 318

Baessler *v.* Foster 513
Bailey, Providence Jewelry Co. *v.* 285
Barnard, Coeling *v.* 634
Barrett, Smith *v.* 325
Baumgarth *v.* Firemen's Fund Insurance Co. 207
Bay County Bridge Commission, Scharman *v.* See 158 Mich. 87.
Bay County Supervisors, Zimmer *v.* 213
Beaudrie, City of Alpena, *for use of*, *v.* Murray Co. .. 336

Digitized by Google

PAGE
Belcher-Stine Lumber Co. *v.* Burns 466
Bellows Falls Machine Co. *v.* Munising Paper Co. 45
Bender's Estate, *In re* 108
Benham *v.* Ferris 632
Benton Harbor *v.* Cutler 364
Besser, City of Alpena *for use of*, *v.* Title Guaranty & Surety Co. 329
Bilderback, Mitchell *v.* 483
Bliss *v.* Saginaw Circuit Judge 507
——— *v.* Tyler 502
Board of Assessors of the City of Detroit, W. A. Sturgeon & Co. *v.* 199
Board of Education of City of Grand Rapids *v.* Brown 148
Board of Supervisors of Bay County, Zimmer *v.* 213
Bolden, *In re* 629
Boucha *v.* Alger Circuit Judge 610
Bourne, Shoenfeld *v.* 139
Breen *v.* Breen 389
Broadwell, Pratt *v.* 375
Brown *v.* Warner 274
———, Board of Education of City of Grand Rapids *v.* 148
Brown & Brown Coal Co. *v.* Grand Trunk Railway System 565
Bryant, Jewett *v.* 345
Bull *v.* Hepworth 662
Burns, Belcher-Stine Lumber Co. *v.* 466

Calhoun Circuit Judge, Stewart *v.* 229
Calumet Insurance Co., Suchocki *v.* 121
Campau *v.* National Film Co. 169
Carnell *v.* Halpin 42
Carter *v.* Reaume 160
Case *v.* Case 491, 493
Cheboygan Circuit Judge, Grand Rapids & Indiana Railroad Co. *v.* 210

Digitized by Google

PAGE
City Electric Railway Co., Stenzhorn *v.* 82
City of Alpena, *for use of* Beaudrie, *v.* Murray Co.. 336
———, ——— Besser, *v.* Title Guaranty & Surety Co. 329
———, ——— O'Brien, *v.* Title Guaranty & Surety Co. 334
City of Benton Harbor *v.* Cutler 364
City of Detroit *v.* Snyder 227
———, Scovel *v.* 95
———, Weber *v.* 14
City of Pontiac, Northrup *v.* 250
Coeling *v.* Barnard 634
Commissioner of Insurance, Federal Life Insurance Co. *v.* 636
———, Franklin Life Insurance Co. *v.* 636
———, United States Annuity & Life Insurance Co. *v.* 636
Corning, Glynn *v.* 474
Corning's Estate, *In re* 474
Courser *v.* Jackson 119
Crystal Ice Co. *v.* United Surety Co. 102
Cullen, Adams & Ford Co. *v.* 669
Cutler, City of Benton Harbor *v.* 364

De Boer *v.* Adams 560
Delor *v.* Delor 624
Dennis *v.* Fidelity Mutual Life Insurance Co. 594
Dennison, Schultz *v.* 259
Detroit *v.* Snyder 227
———, Scovel *v.* 95
———, Weber *v.* 14
Detroit & Mackinac Railway Co., Morrill *v.* 478
Detroit Board of Assessors, W. A. Sturgeon & Co. *v.*. 199
Detroit, Flint & Saginaw Railway, Detroit Trust Co. *v.* 442
Detroit Trust Co. *v.* Detroit, Flint & Saginaw Railway 442

Digitized by Google

PAGE
Detroit United Railway, Reese *v.* 600
———, West *v.* 269
Diamond Match Co., Simons *v.* 241
Dowagiac Gas Co., Kimmerle *v.* 34
Dull *v.* Royal Insurance Co. 671
Dundee, Long *v.* 320

E. E. Naugle Tie Co., Watson *v.* 174

Federal Life Insurance Co. *v.* Commissioner of Insurance 636
Ferris, Benham *v.* 632
Fidelity Mutual Life Insurance Co., Dennis *v.* 594
Fireman's Fund Insurance Co., Baumgarth *v.* 207
First Baptist Church of Eaton Rapids, Menter *v.* 21
Forbes *v.* Gorman 291
Fors *v.* Fors 156
Foster, Baessler *v.* 513
Fox's Estate, *In re* 420
Franklin Life Insurance Co. *v.* Commissioner of Insurance 636
Freedman, Metropolitan Life Insurance Co. *v.* 114
Frohlich *v.* Ashton 265

Gaskill *v.* Jackson Circuit Judge 472
Germain *v.* Union School District of City of Stanton. See 158 Mich. 218.
Gibson, Walsh *v.* 312
Giddings, People *v.* 523
Glazier, People *v.* 528
Glynn *v.* Corning 474
Gorman, Forbes *v.* 291
Grand Rapids & Indiana Railroad Co. *v.* Cheboygan Circuit Judge 210
Grand Rapids Board of Education *v.* Brown 148
Grand Rapids Brewing Co. *v.* Pettis 679
Grand Trunk Railway Company of Canada *v.* Wolcott 588

Digitized by Google

PAGE
Grand Trunk Railway System, Brown & Brown Coal Co. *v.* 565
Green *v.* Michigan United Railways Co. 58
Gzella, Zoltovski *v.* 620

Halpin, Carnell *v.* 42
Hepworth, Bull *v.* 662
Hoek, McCausey *v.* 570
Hoek's Appeal 180
Houghton, Powers *v.* 372
Hulan *v.* Wayne Circuit Judge 605

Illinois Central Railroad Co., Pierson *v.* 110
In re Bender's Estate 108
——— Bolden 629
——— Corning's Estate 474
——— Fox's Estate 420
——— Kennedy's Estate 548
——— Radford 91

Jackson, Courser *v.* 119
Jackson Circuit Judge, Gaskill *v.* 472
Jarmoszka, Swantek *v.* 99
Jewett *v.* Bryant 345

Kalamazoo Circuit Judge, Michigan United Railways Co. *v.* 399
Kalamazoo Trust Co. *v.* Merrill 649
Kaukola *v.* Oliver Iron Mining Co. 689
Kennedy's Estate, *In re* 548
Kent Circuit Judge, Price *v.* 614
Kimmerle *v.* Dowagiac Gas Co. 34
Klatt *v.* Wayne Probate Judge 203
Klotz *v.* Lenawee Circuit Judge 639
Kuennan *v.* United States Fidelity & Guaranty Co. .. 122
Kuenzel, People *for use of*, *v.* National Construction Co. 133

Digitized by Google

PAGE
Lampert, Sisson *v.* 509
Latham, Mayo *v.* 136
Lavery, Andrews *v.* 26
Lenawee Circuit Judge, Klotz *v.* 639
Long *v.* Village of Dundee 320
Look, Appeal of 108

McCall *v.* McCall 144
———, Auditor General *v.* 318
McCausey *v.* Hoek 570
McDonald *v.* Marquette Circuit Judge 367
McFadden, Norris *v.* 424
Macomber, Moody *v.* 657
Marquette Circuit Judge, McDonald *v.* 367
Mayo *v.* Latham 136
Meilke *v.* Schabble 163
Menter *v.* First Baptist Church of Eaton Rapids 21
Merrill, Kalamazoo Trust Co. *v.* 649
Metropolitan Life Insurance Co. *v.* Freedman 114
Michigan Central Railroad Co., Michigan Railroad Commission *v.* 580
Michigan Coal & Mining Co., Schmidt *v.* 308
Michigan Railroad Commission *v.* Michigan Central Railroad Co. 580
Michigan United Railways Co. *v.* Kalamazoo Circuit Judge 399
———, Green *v.* 58
Mills, Thoman *v.* 402
Milner, Nisbett *v.* 337
Mitchell *v.* Bilderback 483
Montmorency Circuit Judge, Murphy *v.* 392
Moody *v.* Macomber 657
Moore *v.* White 460
Morrill *v.* Detroit & Mackinac Railway Co. 478
Morrison, Starr Piano Co. *v.* 583
Moyer *v.* Ann Arbor Railroad Co. 645
Munising Paper Co., Bellows Falls Machine Co. *v.* 45
Munoskong Hunting & Fishing Club, Ainsworth *v.* 61

Digitized by Google

PAGE
Murphy *v.* Montmorency Circuit Judge 392
Murray Co., City of Alpena, *for use of* Beaudrie, *v.*.. 336

National Cash Register Co. *v.* Richards 128
National Construction Co., People, *for use of* Kuenzel, *v.* 133
National Film Co., Campau *v.* 169
Naugle (E. E.) Tie Co., Watson *v.* 174
Nichols, People *v.* 355
Nisbett *v.* Milner 337
Norris *v.* McFadden 424
Northrup *v.* City of Pontiac 250

Oblaser *v.* Wayne Circuit Judge 665
O'Brien, City of Alpena, *for use of*, *v.* Title Guaranty & Surety Co. 334
Ohio German Fire Insurance Co., O'Toole *v.* 187
Oliver Iron Mining Co., Kaukola *v.* 689
Orton *v.* Orton 236
Osborn, Andrews *v.* 77
O'Toole *v.* Ohio German Fire Insurance Co. 187

Parker, Rogers *v.* 278
People *v.* Anderson 185
——— *v.* Giddings 523
——— *v.* Glazier 528
——— *v.* Nichols 355
——— *v.* Poole 350
——— *v.* Williams 518
———, *for use of* Kuenzel, *v.* National Construction Co. 133
Pettis, Grand Rapids Brewing Co. *v.* 679
Phillips, Weidman *v.* 380
Pierson *v.* Illinois Central Railroad Co. 110
Pontiac, Northrup *v.* 250
Poole, People *v.* 350
Powers *v.* Houghton 372
Pratt *v.* Broadwell 375

Digitized by Google

PAGE
Price *v.* Kent Circuit Judge 614
Providence Jewelry Co. *v.* Bailey 285
Provident Savings Life Assurance Society, Smith *v.*... 167
Pulfer, Allen *v.*... 616

Radford, *In re*..... 91
Reaume, Carter *v.* 160
Reese *v.* Detroit United Railway 600
Richards, National Cash Register Co. *v.* 128
Robinson *v.* Westover..... 225
Rogers *v.* Parker..... 278
Rosen *v.* Rosen 72
Royal Insurance Co., Dull *v.* 671
Ruch *v.* Ruch 231

Saginaw Circuit Judge, Bliss *v.* 507
Schabble, Meilke *v.* 163
Scharman *v.* Bay County Bridge Commission. See 158 Mich. 87.
Schmidt *v.* Michigan Coal & Mining Co. 308
Schoenfeld *v.* Bourne 139
Schultz *v.* Dennison 259
Scott *v.* Sullivan 297
Scovel *v.* City of Detroit 95
Secretary of State, American Telephone & Telegraph Co. *v.* 195
Seelman, Ulmer *v.*..... 253
Simons *v.* Diamond Match Co. 241
Sisson *v.* Lampert 509
Smith *v.* Barrett 325
——— *v.* Provident Savings Life Assurance Society . 167
Snyder, City of Detroit *v.* 227
Starr Piano Co. *v.* Morrison 583
State Dairy and Food Commissioner, Armour & Co. *v.* 1
Stenzhorn *v.* City Electric Railway Co. 82
Stewart *v.* Calhoun Circuit Judge 229

Digitized by Google

PAGE
Sturgeon (W. A.) & Co. *v.* Board of Assessors of the City of Detroit 199
Suchocki *v.* Calumet Insurance Co. 121
Sullivan, Scott *v.* 297
Swantek *v.* Jarmoszka 99

Thoman *v.* Mills 402
Title Guaranty & Surety Co., City of Alpena, *for use of* Besser, *v.* 329
———, City of Alpena, *for use of* O'Brien, *v.* 334
Tyler, Bliss *v.* 502

Ulmer *v.* Seelman 253
Union School District of City of Stanton, Germain *v.* See 158 Mich. 218.
United States Annuity & Life Insurance Co. *v.* Commissioner of Insurance 636
United States Fidelity & Guaranty Co., Kuennan *v.* .. 122
United Surety Co., Crystal Ice Co. *v.* 102

Van Dyke's Estate, Weessies *v.* 180
Village of Dundee, Long *v.* 320

Walsh *v.* Gibson 312
Warner, Brown *v.* 274
W. A. Sturgeon & Co. *v.* Board of Assessors of the City of Detroit 199
Watson *v.* E. E. Naugle Tie Co. 174
Wayne Circuit Judge, Allen *v.* 612
———, Hulan *v.* 605
———, Oblaser *v.* 665
Wayne Probate Judge, Klatt *v.* 203
Weber *v.* City of Detroit 14
Weessies *v.* Van Dyke's Estate 180
Weidman *v.* Phillips 380
West *v.* Detroit United Railway 269
Westover, Robinson *v.* 225

Digitized by Google

PAGE
White, Moore *v.* 460
Williams, People *v.* 518
Wolcott, Grand Trunk Railway Company of Canada *v.* 588

Zimmer *v.* Board of Supervisors of Bay County 213
Zoltovski *v.* Gzella 620

128 CASES.

Digitized by Google

TABLE OF CASES CITED.

PAGE

Abbott *v.* Abbott, 41 Mich. 542 559
Ada Township *v.* Kent Circuit Judge, 114 Mich. 77 219
Ainsworth *v.* Munoskong Hunting & Fishing Club, 153 Mich. 185 .. 62
Allen *v.* Withrow, 110 U. S. 119 490
———, *In re*, 139 Mich. 712 631
Allison *v.* Chandler, 11 Mich. 542 578
Alpena, *for use of* Besser, *v.* Surety Co., 159 Mich. 329 ..... 335, 337
———, ——— O'Brien, *v.* Surety Co., 159 Mich. 334 336
———, ——— Zess, *v.* Surety Co., 158 Mich. 678 331
American Brewing Co. *v.* Talbot, 135 Mo. 170 635
A. M. Todd Co. *v.* Insurance Co., 137 Mich. 188 674
Anderson *v.* Hill, 54 Mich. 477 276
——— *v.* Railroad Co., 107 Mich. 592 700
——— *v.* Smith, 108 Mich. 69 76
Andries *v.* Railway Co., 105 Mich. 557 25
Ann Arbor Fruit & Vinegar Co. *v.* Railroad Co., 136 Mich. 599 .. 24
Antcliff *v.* June, 81 Mich. 477 374
Arispe Mercantile Co. *v.* Insurance Co., 133 Iowa, 272 675
Ashley *v.* Smith's Estate, 152 Mich. 197 184
Aspell *v.* Hosbein, 98 Mich. 121 276
Atchison, etc., R. Co. *v.* Clark, 60 Kan. 826 220
——— *v.* Hurley, 158 Fed. 509, 82 C. C. A. 453 656
Atkins *v.* Borstler, 46 Mich. 552 168
Attorney General *v.* Jochim, 99 Mich. 358 218
——— *v.* Railroad Co., 55 Mich. 15 611
Auer *v.* Vahl, 129 Wis. 635 439
Avery *v.* Board of Sup'rs of Ionia Co., 71 Mich. 538 135

Bailey *v.* Irwin, 72 Ala. 505 490
Balhoff *v.* Railroad Co., 106 Mich. 607 700
Banderob *v.* Railway Co., 133 Wis. 249 311
Bank of Toronto *v.* Nixon, 4 Ont. App. 346 654
Barber *v.* Smith, 41 Mich. 138 654
Barlage *v.* Railway Co., 54 Mich. 564 661
Barnewall *v.* Murrell, 108 Ala. 366 557
Bass Foundry & Machine Works *v.* Gallentine, 99 Ind. 525 .. 454, 455
Bauer *v.* Foundry Co., 132 Mich. 537 702
Baumgarth *v.* Insurance Co., 152 Mich. 479 208
Beals *v.* Deposit Co., 76 App. Div. 526 333
Beattie *v.* Railway, 158 Mich. 243 604
Beaver *v.* Beaver, 117 N. Y. 421, 428 490
Beesley *v.* F. W. Wheeler & Co., 103 Mich. 211 699
Bendernagle *v.* Cocks, 19 Wend. (N. Y.) 151 209
Bennett *v.* City of St. Joseph, 146 Mich. 382 251
——— *v.* Sullivan, 100 Me. 118 440
Berrigan *v.* Railroad Co., 131 N. Y. 582 648
Bigley *v.* Souvey, 45 Mich. 370 661
Blain *v.* Chippewa Circuit Judge, 145 Mich. 59 ..... 392, 397

Digitized by Google

PAGE
Bliss *v.* Tyler, 156 Mich. 640 ..... 504, 507, 643
Blodgett *v.* Foster, 114 Mich. 688 40
Board of Fire and Water Com'rs of Marquette *v.* Wilkinson, 119 Mich. 655 ..... 413, 544
Board of Road Com'rs of Wayne County *v.* Board of Auditors, 148 Mich. 255 219
Board of State Tax Com'rs *v.* Board of Assessors, 124 Mich. 491 ..... 218, 222
——— *v.* Quinn, 125 Mich. 128 218
Bock *v.* Grocery Co., 100 Minn. 71 635
Boman *v.* Iron Co., 147 Mich. 178 703
Bond *v.* Ward, 7 Mass. 127 575
Bowe *v.* Hunking, 135 Mass. 380 440
Bowen *v.* Brogan, 119 Mich. 218 147
Boyd *v.* Rice, 88 Mich. 599 283
Brand *v.* Hinchman, 68 Mich. 590 374
Breitenwischer *v.* Clough, 111 Mich. 6, 116 Mich. 340 98
Bresler *v.* Investment Ass'n, 156 Mich. 3 204
Brevoort *v.* City of Detroit, 24 Mich. 322 609
Briffitt *v.* State, 58 Wis. 39 186
Briggs *v.* Briggs, 113 Mich. 371 233
Brinkerhoff *v.* Brumfield, 94 Fed. 422 220
Brisco, United States, *for use of*, *v.* Surety Co., 23 App. Cas. (D. C.) 155 333
British America Assurance Co. *v.* Cooper, 6 Colo. App. 25 675
Brounstein *v.* Sahlein, 65 Hun (N. Y.), 365 374
Brown *v.* Brown, 144 Mich. 654 628
——— *v.* Gilchrist, 80 Mich. 56 ..... 44, 699
——— *v.* Railroad, 73 N. H. 568 312
Buhl *v.* Union Depot Co., 98 Mich. 596 152
Bullock *v.* Taylor, 89 Mich. 137 76
Burgess *v.* Stribling, 134 Mich. 88 80
Burke *v.* Electric Co., 147 Mich. 172 604
Burlage *v.* Burlage, 65 Mich. 624 240
Burnham *v.* Casualty Co., 117 Mich. 142 ..... 107, 678
——— *v.* McQuesten, 48 N. H. 446 25
Buxton *v.* Ainsworth, 138 Mich. 532 91

Cable Co. *v.* Wasegizig, 130 Mich. 387 132
Cadwalader *v.* Zeh, 151 U. S. 171 9
Cain *v.* Brown, 111 Mich. 657 611
Camp *v.* Township of Algansee, 50 Mich. 4 ..... 276, 277
Campau *v.* Barnard, 25 Mich. 381 264
Campbell *v.* Campbell, 149 Mich. 147 501
Carmichael *v.* Carmichael, 72 Mich. 76 234
Carnahan *v.* Pond, 15 Abb. Prac. (N. Y.) 194 208
Carpenter *v.* Greenop, 74 Mich. 664 654
Carter *v.* Hill, 81 Mich. 275 113
Carthage *v.* Telegraph Co., 185 N. Y. 448 196
Chambers *v.* Sloan, 19 Ga. 84 654
Chapman, United States, *for use of*, *v.* Surety Co., 23 App. Cas. (D. C.) 153 333
Chattanooga Nat. Bank *v.* Rome Iron Co., 102 Fed. 755 656
Chicago, etc., R. Co. *v.* Johnson, 205 Ill. 598 25
——— *v.* Morehouse, 112 Wis. 1 370

Digitized by Google

PAGE
City of Alpena, *for use of* Besser, *v.* Surety Co., 159 Mich. 329-335, 337
———, ——— O'Brien, *v.* Surety Co., 159 Mich. 334 ... 336
———, ——— Zess, *v.* Surety Co., 158 Mich. 678 ... 331
City of Detroit *v.* Brennan & Co., 98 Mich. 338 ... 153
——— *v.* Railway, 156 Mich. 106 ... 228
——— *v.* Snyder, 156 Mich. 511 ... 228
——— *v.* Transportation Co., 140 Mich. 174 ... 201
——— *v.* Wayne Circuit Judge, 127 Mich. 604 ... 201
City of Knoxville *v.* Water Co., 212 U. S. 1 ... 583
City of Philadelphia, *for use of* Taylor, *v.* Malone, 214 Pa. 90 ... 333
City of Rochester *v.* Telephone Co., 52 App. Div. (N. Y.) 6 ... 196
City of St. Joseph *v.* Seel, 122 Mich. 70 ... 19
Clark *v.* Babcock, 23 Mich. 164 ... 439
——— *v.* Cement Co., 138 Mich. 678 ... 702
Clarke *v.* Case, 144 Mich. 148 ... 351
——— *v.* Clark, L. R. 1 Ch. App. Cas. 16 ... 173
Clay *v.* Layton, 134 Mich. 337 ... 661
Cleaver *v.* Insurance Co., 65 Mich. 527 ... 116
——— *v.* ———, 71 Mich. 414 ... 678
Cleland *v.* Casgrain, 92 Mich. 149 ... 344
Cleveland Iron Mining Co. *v.* Husby, 72 Mich. 61 ... 81
Cluett *v.* Rosenthal, 100 Mich. 198 ... 198
Cochrane *v.* Johnson, 95 Mich. 67 ... 143
Codde *v.* Mahiat, 109 Mich. 186 ... 81
Coit *v.* City of Grand Rapids, 115 Mich. 498 ... 99
Colburn's Estate, *In re*, 153 Mich. 206 ... 184
Cole *v.* Hines, 81 Md. 476 ... 132
——— *v.* People, 37 Mich. 544 ... 357
——— *v.* Railway Co., 81 Mich. 156 ... 512
Collar *v.* Collar, 86 Mich. 513 ... 490
Collins *v.* Jackson, 54 Mich. 186 ... 137
Columbus Buggy Co. *v.* Turley, 82 L. R. A. 260 (73 Miss. 529) ... 586
Com. *v.* Griffin, 110 Mass. 181 ... 193
Compton *v.* Compton, 5 La. Ann. 615 ... 76
Cook *v.* Canny, 96 Mich. 398 ... 654
——— *v.* Insurance Co., 84 Mich. 12 ... 511
Cooper *v.* Lawson, 139 Mich. 628 ... 441
——— *v.* Tappan, 9 Wis. 361 ... 76
Corliss *v.* Smith, 53 Vt. 532 ... 166
Covert *v.* Morrison, 49 Mich. 133 ... 661
Cox *v.* Welcher, 68 Mich. 263 ... 277
Crane *v.* Hardy, 1 Mich. 56 ... 44
Crissman *v.* Crissman, 23 Mich. 216 ... 490
Cristanelli *v.* Mining Co., 154 Mich. 423 ... 699
Cronin *v.* Fire Ass'n, 123 Mich. 277 ... 674
Curtiss *v.* Witt, 110 Mich. 131 ... 276

Daly *v.* Railway Co., 105 Mich. 193 ... 90
Danley *v.* Jefferson, 150 Mich. 590 ... 558
Daumiel *v.* Gorham, 6 Cal. 44 ... 574
Davidson *v.* Hine, 151 Mich. 294 ... 219
Davis *v.* Merrill, 51 Mich. 480 ... 654
Dawson *v.* Township of Aurelius, 49 Mich. 479 ... 276, 277
Decker *v.* Kanous' Estate, 129 Mich. 146 ... 184
De Kallands *v.* Telephone Co., 158 Mich. 25 ... 703
De Lisle *v.* Wayne Circuit Judge, 158 Mich. 16 ... 508

Digitized by Google

PAGE
Delray Lumber Co. *v.* Keohane, 132 Mich. 17 268
De Mazar *v.* Pybus, 4 Ves. Jr. 644 654
Derham *v.* Derham, 125 Mich. 109, 112 192
Detroit *v.* Brennan & Co., 93 Mich. 338 153
——— *v.* Railway, 156 Mich. 106 228
——— *v.* Snyder, 156 Mich. 511 228
——— *v.* Transportation Co., 140 Mich. 174 201
——— *v.* Wayne Circuit Judge, 127 Mich. 604 201
Detroit, etc., Plank Road Co. *v.* Railway Co., 103 Mich. 585 306
Detroit United Ry. *v.* State Tax Com'rs, 136 Mich. 96 ..... 453, 454
Deyoe *v.* Jamison, 33 Mich. 94 132
Dillon *v.* Barnard, 21 Wall. (U. S.) 430 456
Dimick *v.* Downs, 82 Ill. 572 511
Dodge *v.* Mills, 150 Mich. 394 418
Donaldson *v.* Donaldson, 134 Mich. 291 501
Dowell's Estate, *In re*, 152 Mich. 194 661
Doyle *v.* Railway Co., 147 U. S. 413 440
Draper *v.* Brown, 153 Mich. 120 81
Driscoll *v.* People, 47 Mich. 413 521
Dummer *v.* Gypsum Co., 153 Mich. 622 25
Dunham *v.* Railway Co., 1 Wall. (U. S.) 254 456
Durell *v.* Pritchard, L. R. 1 Ch. App. Cas. 251 173

Earle *v.* Kent Circuit Judge, 92 Mich. 285 506
Eaton *v.* Trowbridge, 38 Mich. 454 344
Eckler *v.* Alden, 125 Mich. 215 98
Ecliff *v.* Railway Co., 64 Mich. 203 623
Edwards *v.* City of Worcester, 172 Mass. 105 511
——— *v.* Clark, 83 Mich. 246 247
——— *v.* Mining Co., 38 Mich. 46 ..... 172, 173
Eels *v.* Telegraph Co., 143 N. Y. 133 196
Enright *v.* Railway Co., 93 Mich. 409 648
Ensley *v.* Railway, 134 Mich. 195 604
Ervin *v.* Navigation Co., 27 Fed. 625 409
Esper *v.* Miller, 131 Mich. 334 40
Essexville *v.* Emery, 90 Mich. 183 17
Estlow *v.* Hanna, 75 Mich. 219 ..... 142, 143, 469
Evans *v.* Negley, 13 Serg. & R. (Pa.) 218 76

Fairbairn *v.* Moody, 116 Mich. 61 268
Fanning *v.* Krapfl, 61 Iowa, 417 142
Farmers' Loan & Trust Co. *v.* San Diego St. Car Co., 45 Fed. 527 409
Farrah *v.* Bursley, 100 Mich. 547 133
Farwell *v.* Johnston, 34 Mich. 342 235
Fenton *v.* Miller, 116 Mich. 45 264
Ferguson *v.* Hubbell, 97 N. Y. 507 282
Ferris *v.* Neville, 127 Mich. 444 661
Finn *v.* Railway Co., 86 Mich. 74 603
First Baptist Church of Jackson *v.* Insurance Co., 119 Mich. 203 189
First Parish in Woburn *v.* County of Middlesex, 7 Gray (Mass.), 106 152
Fishel *v.* Goddard, 30 Colo. 147 409
Fluhrer *v.* Railway Co., 121 Mich. 213 701
Flynn *v.* City of Detroit, 93 Mich. 590 17
——— *v.* Lorimer's Estate, 141 Mich. 707 80

Digitized by Google

PAGE
Fong Yue Ting *v.* United States, 149 U. S. 698 69
Ford *v.* Savage, 111 Mich. 144 ..... 98, 234
Fortin *v.* Electric Co., 154 Mich. 316 511
Fosdick *v.* Schall, 99 U. S. 235, 251 456
Fox *v.* Iron Co., 89 Mich. 387 700
Fox's Estate, *In re*, 154 Mich. 5 ..... 421, 423
Freese *v.* Arnold, 99 Mich. 13 262
French *v.* Lumber Co., 135 Mich. 424 804
Frohlich *v.* Carroll, 127 Mich. 561 268
Fuller *v.* City of Grand Rapids, 105 Mich. 529 19

Gallagher *v.* Button, 73 Conn. 172 438
Galveston R. R. *v.* Cowdrey, 11 Wall. (U. S.) 459, 480, 482, ... 456
Gannon *v.* People, 127 Ill. 507 193
Gaskill *v.* Weeks, 154 Mich. 223, 156 Mich. 668 472
Gates *v.* Railway Co., 151 Mich. 548 ..... 568, 569
Gavigan *v.* Railway Co., 110 Mich. 71 647
Geddis *v.* Wayne Circuit Judge, 151 Mich. 122 609
Geiger *v.* State, 6 Neb. 545 193
Genrow *v.* Modern Woodmen, 151 Mich. 250 116
George *v.* Light Co., 105 Mich. 1 343
Gillett *v.* Burns, 131 Mich. 617 109
Gillson *v.* Railway Co., 33 U. C. Q. B. 128, 35 U. C. Q. B. 475 282
Ginn *v.* Coal Co., 143 Mich. 84 291
Glens Falls Ins. Co. *v.* Hopkins, 16 Ill. App. 220 675
Goddard *v.* Importing Co., 9 Colo. App. 306 409
Godfrey Lumber Co. *v.* Cole, 151 Mich. 280 268
Godkin *v.* Township of Doyle, 143 Mich. 236 324
Gordon *v.* Richardson, 185 Mass. 492 307
Grand Rapids Electric R. Co. *v.* Calhoun Circuit Judge, 156 Mich. 419 609
Granger *v.* Assurance Co., 119 Mich. 177 678
——— *v.* Judge of Superior Court of Detroit, 44 Mich. 384 ..... 141, 470
Gratwick, etc., Lumber Co. *v.* Village of Oscoda, 97 Mich. 221 323
Gray *v.* Barton, 62 Mich. 186 81
Green *v.* Grant, 134 Mich. 462 76
Greenwood Ice & Coal Co. *v.* Insurance Co., 72 Miss. 46 675
Gregory *v.* Knight, 50 Mich. 61 17
Griffin *v.* McKnight, 116 Mich. 470 109
Grimes *v.* Bowerman, 92 Mich. 258 654
Gunning (R. J.) Co. *v.* Cusack, 50 Ill. App. 290 295

Haapa *v.* Insurance Co., 150 Mich. 467 116
Hagerman *v.* Wigent, 108 Mich. 192 ..... 113, 192
Hairston *v.* Railway Co., 208 U. S. 598 370
Haldane *v.* Sweet, 55 Mich. 196 247
Hall *v.* Nester, 122 Mich. 141 343
Hall *v.* Rood, 40 Mich. 46 173
Hamilton *v.* Hall's Estate, 111 Mich. 291 490
——— *v.* People, 29 Mich. 176 ..... 667, 668
Harris *v.* O'Gorman, 118 Mich. 553 133
——— *v.* Visscher, 57 Ga. 232 654
Harrison Township *v.* Board of Sup'rs of Schoolcraft Co., 117 Mich. 215 366
Hart *v.* Mills, 38 Tex. 513 209
——— *v.* Village of New Haven, 130 Mich. 181, 186 578

Digitized by Google

PAGE
Hart *v.* Windsor, 12 Mees. & W. 68 ..... 438, 439
Hastings Industrial Co. *v.* Moran, 143 Mich. 679 128
Hatch *v.* Calhoun Circuit Judge, 127 Mich. 174 206
Haywood *v.* Johnson, 41 Mich. 598 168
Hazen *v.* Electric Co., 152 Mich. 457 604
Heath *v.* Wells, 5 Pick. (Mass.) 140 82
Helfrich *v.* Stem, 17 Pa. 153 576
Henderson *v.* Railway, 116 Mich. 368 623
——— *v.* Reynolds, 11 L. R. A. (N. S.) 960 (168 Ind. 522) 613
Herrick *v.* Wixom, 121 Mich. 384 312
Hialey *v.* Hialey's Estate, 157 Mich. 45 184
Hinchman *v.* Rutan, 31 N. J. Law, 499 209
Hindman *v.* O'Connor, 54 Ark. 627 409
Hirth, People, *for use of*, *v.* Powers, 108 Mich. 339 135
Hitchcock *v.* Moore, 70 Mich. 112 118
——— *v.* Wayne Circuit Judge, 144 Mich. 362 609
Hoare *v.* Oriental Bank Corp., L. R. 2 App. Cas. 589 654
Hodges *v.* Buell, 134 Mich. 162 304
Hogan *v.* Railway, 140 Mich. 101, 148 Mich. 283, 154 Mich. 478 .. 449
Holland *v.* Hoyt, 14 Mich. 238 235
Houghton *v.* Houghton, 14 Ind. 505 33
Hovey *v.* McDonald, 109 U. S. 150 609
Howell *v.* Schneider, 24 App. Cas. (D. C.) 532 438
Hubner *v.* Reickhoff, 103 Iowa, 368 143
Hudson River Telephone Co. *v.* Railroad Co., 56 Hun, 67, 61 Hun, 140, 135 N. Y. 393 196
Hunt *v.* Iron Co., 97 Mass. 279 454–456

In re Allen, 139 Mich. 712 631
——— Colburn's Estate, 153 Mich. 206 184
——— Dowell's Estate, 152 Mich. 194 661
——— Fox's Estate, 154 Mich. 5 ..... 421, 423
——— Kene's Estate, 29 N. Y. Supp. 1079 422
——— Livingston's Estate, 1 App. Div. (N. Y.) 568 ..... 422, 424
——— Mills, 1 Mich. 392 94
——— Offerman's Estate, 25 App. Div. (N. Y.) 94 424
——— Pullman's Estate, 46 App. Div. (N. Y.) 574 424
——— Shepard, 109 Mich. 631 94
——— Vitali, 153 Mich. 514 631
——— Wakeham, L. R. 13 Q. B. Div. 43 654

Jacaud *v.* French, 12 East, 317 654
Jackson *v.* City of Lansing, 121 Mich. 279 251
——— *v.* Evans, 8 Mich. 476 125
Jackson Consolidated Traction Co. *v.* Jackson Circuit Judge, 155 Mich. 522 ..... 59, 60
Jaffe *v.* Harteau, 56 N. Y. 398 440
Jaffray *v.* Jennings, 101 Mich. 515 142
James *v.* Mining Co., 55 Mich. 335 700
Jaskulski *v.* Insurance Co., 131 Mich. 603 674
Johnson *v.* Delbridge, 35 Mich. 436 142
——— *v.* Johnson, 125 Mich. 671 616
Jones *v.* Blun, 145 N. Y. 333 654
——— *v.* Palmer, 1 Doug. (Mich.) 379 44
——— *v.* Smith, 22 Mich. 360 344

Keates *v.* Earl of Cadogan, 10 Com. B. (N. S.) 591 440

Digitized by Google

PAGE
Kellogg *v.* Payne, 21 Iowa, 575 282
Kelly *v.* Emery, 75 Mich. 147 159
Kene's Estate, *In re*, 29 N. Y. Supp. 1079 422
Kerkow *v.* Bauer, 15 Neb. 150 186
Kilburn *v.* Adams, 7 Metc. (Mass.) 33 25
King *v.* Carpenter, 87 Mich. 363 344
——— *v.* Harrington, 14 Mich. 532 ..... 142, 470
Kinney *v.* Harrett, 46 Mich. 87 141
——— *v.* Robison, 52 Mich. 389 654
Kirchner *v.* Railway, 91 Mich. 400 603
Kleinow *v.* Kleinow, 126 Mich. 365 284
Kline *v.* Moulton, 11 Mich. 370 661
Knapp *v.* Railway Co., 114 Mich. 199 700
Knox County *v.* Harshman, 132 U. S. 14 609
Knoxville *v.* Water Co., 212 U. S. 1 583
Kotcher *v.* Perrin, 149 Mich. 690 ..... 268, 269
Kotila *v.* Railway Co., 134 Mich. 315 87
Kuennan *v.* United States Fidelity & Guaranty Co., 159 Mich. 123 134

Labarge *v.* Railroad Co., 134 Mich. 139 91
Lafayette Bridge Co. *v.* Olsen, 108 Fed. 335 44
Lafferty *v.* Savings Bank, 76 Mich. 35 80
Laird *v.* Laird, 115 Mich. 352 233
Lake Shore, etc., R. Co. *v.* City of Grand Rapids, 102 Mich. 374 454
Lamotte *v.* Boyce, 105 Mich. 545, 548 702
Lanctot *v.* State, 98 Wis. 136 192
Lansky *v.* Prettyman, 140 Mich. 40 563
La Plaisance Bay Harbor Co. *v.* City of Monroe, Wlk. Ch. (Mich.) 155 64
Larzelere *v.* Starkweather, 88 Mich. 96 421
Lautenshlager *v.* Lautenshlager, 80 Mich. 285 661
Learned *v.* Ayers, 41 Mich. 679 654
Leavitt *v.* Fletcher, 10 Allen (Mass.), 119 439
Le Barron *v.* Babcock, 9 L. R. A. 625 262
Leonard *v.* City of Detroit, 108 Mich. 600 17
——— *v.* Leonard, 145 Mich. 563 660
Lewis *v.* Whittimore, 5 N. H. 364–366 575
——— *v.* Wright, 148 Mich. 290 147
Liebler *v.* Carrel, 155 Mich. 196 ..... 682, 684, 686, 687
Liggett *v.* Glenn, 51 Fed. 381 191
Lincoln *v.* Davis, 53 Mich. 375 64
——— *v.* Felt, 132 Mich. 49 661
Lister *v.* Smith, 3 S. & T. 282 ..... 554, 556
Little Rock, etc., R. Co. *v.* St. Louis, etc., R. Co., 63 Fed. 775, 11 C. C. A. 417 569
Livingstone *v.* Plate Glass Co., 146 Mich. 236 699
Livingston's Estate, *In re*, 1 App. Div. (N. Y.) 568 ..... 422, 424
Long *v.* Mayor, etc., of Battle Creek, 39 Mich. 323 98
Lowell *v.* Strahan, 145 Mass. 1 295
Luttrell & Co. *v.* Railroad Co. (Tenn.), 105 S. W. 565 333
Lyle *v.* Cass Circuit Judge, 157 Mich. 33 211
Lyons *v.* Railway Co., 115 Mich. 114 ..... 87, 90

McBryde *v.* Sayre, 86 Ala. 458 173
McClure *v.* Otrich, 118 Ill. 320 235

Digitized by Google

PAGE
McCormick *v.* Water Co., 40 Cal. 185 334
McCoy *v.* Hedden, 38 Fed. 89 ..... 9, 10
McDaniels *v.* Walker, 44 Mich. 83 264
McDonald *v.* McDonald, 67 Mich. 122 521
——— *v.* Railroad Co., 108 Mich. 8 701
——— *v.* ———, 132 Mich. 372 ..... 44, 701
——— *v.* ———, 105 Mich. 659 697
McGee *v.* Baumgartner, 121 Mich. 287 316
McGough *v.* Wellington, 6 Allen (Mass.), 505 471
McGowan *v.* Lamb, 66 Mich. 615 654
McGuire *v.* State, 7 Humph. (Tenn.) 54 546
McHench *v.* McHench, 7 Hill (N. Y.), 204 208
McIntyre *v.* City of Kalamazoo, 154 Mich. 301 251
——— *v.* Detroit Safe Co., 129 Mich. 385 44
McKernan *v.* Street Railway, 138 Mich. 519 273
McLean *v.* Isbell, 44 Mich. 129 209
McPherson *v.* Runyon, 41 Minn. 524 374
Maher *v.* People, 10 Mich. 212 354
Maier *v.* Life Ass'n, 78 Fed. 566 116
Mains *v.* Steel Fence Co., 116 Mich. 538 79
Mallock *v.* Derby, 190 Mass. 208 311
Manistique Lumbering Co. *v.* Lovejoy, 55 Mich. 189 613
Manke *v.* Manke, 75 Mich. 435 38
Marble *v.* Price, 54 Mich. 466 19
Marquette Board of Fire & Water Com'rs *v.* Wilkinson, 119 Mich. 655 ..... 413, 544
Marthinson *v.* Insurance Co., 64 Mich. 372 678
Mathias *v.* Cramer, 73 Mich. 5 206
Mawich *v.* Elsey, 47 Mich. 10 ..... 318, 512
Maynard *v.* Vinton, 59 Mich. 139 ..... 113, 192
Menzer *v.* Menzer, 83 Mich. 319 501
Mercer *v.* State, 40 Fla. 216 191
Merriman *v.* Jackson Circuit Judge, 96 Mich. 603 508
Merrinane *v.* Miller, 157 Mich. 279 513
Meyers *v.* Shields, 61 Fed. 713 220
Michigan Cent. R. Co. *v.* Wayne Circuit Judge, 156 Mich. 459 ..... 581, 582
Millar *v.* Babcock, 29 Mich. 526 ..... 142, 470
Miller *v.* Hoeschler, 126 Wis. 263 464
Mills, *In re*, 1 Mich. 392 94
Minor Lumber Co. *v.* City of Alpena, 97 Mich. 499 323
Mitchell *v.* Wells, 54 Mich. 127 654
Moon *v.* McKinstry, 107 Mich. 673 137
Moore *v.* Weber, 71 Pa. 429 438
Moreland *v.* Millen, 126 Mich. 381 219
Morgan *v.* Iron Co., 133 N. Y. 666 648
Morrill *v.* Mackman, 24 Mich. 279 295
Morton *v.* Railroad Co., 81 Mich. 423 ..... 44, 700
Moss *v.* Cummings, 44 Mich. 359 276
Murphy *v.* Inhabitants of Montclair, 39 N. J. Law, 673 186
Mutual Benefit Life Ins. Co. *v.* Commissioner of Insurance, 151 Mich. 610 638

Narramore *v.* Railway Co., 96 Fed. 301, 37 C. C. A. 501 702
Nester *v.* Township of Baraga, 133 Mich. 640 201

Digitized by Google

PAGE

New York Central Ins. Co. *v.* National Protection Ins Co., 14 N. Y. 85 675
New York Life Ins. Co. *v.* Fletcher, 117 U. S. 519 116
Nichols *v.* Nichols, 2 Phille. 180 555
——— *v.* Railroad Co., 145 Mich. 643 702
Niles *v.* Railroad Co., 14 App. Div. (N. Y.) 58 648
Norman *v.* Olney, 64 Mich. 553 80
North *v.* Fence Co., 144 Mich. 557 333
Nugent *v.* Nugent, 70 Mich. 52 470

O'Brien, City of Alpena, *for use of*, *v.* Surety Co., 159 Mich. 334 336
O'Dea *v.* Railroad Co., 142 Mich. 265 112
Offerman's Estate, *In re*, 25 App. Div. (N. Y.) 94 424
Olivier *v.* Street Railway Co., 134 Mich. 367 271
O'Neil *v.* Greenwood, 106 Mich. 572 490
Orr Shoe Co. *v.* Frankenthal, 4 Ind. T. 375 576
Osmun *v.* Oakland Circuit Judge, 107 Mich. 27 421
Ostrander *v.* Packer, 35 Mich. 430 573
Overby *v.* Gordon, 177 U. S. 214, 223 476

Peake *v.* Fuller, 128 Mich. 684 379
Pease *v.* Warner, 153 Mich. 140 248
Peck *v.* Houghtaling, 35 Mich. 127 248
Pelton *v.* Schmidt, 104 Mich. 345 311
Pennsylvania Steel Co. *v.* Lumber Co., 63 Fed. 11 453
People *v.* Brown, 142 Mich. 622 358
——— *v.* Burke, 157 Mich. 113 527
——— *v.* Butler, 122 Mich. 35 537
——— *v.* Connelly, 157 Mich. 260 521
——— *v.* Decarie, 80 Mich. 578 ..... 229, 230
——— *v.* Durfee, 62 Mich. 487 193
——— *v.* Eastwood, 14 N. Y. 566 511
——— *v.* Elmer, 109 Mich. 493 545
——— *v.* Farrell, 146 Mich. 264 631
——— *v.* Foss, 80 Mich. 559 258
——— *v.* Gosch, 82 Mich. 31 141
——— *v.* Haas, 79 Mich. 449 ..... 229, 230
——— *v.* Hamilton, 76 Mich. 212 357
——— *v.* Harris, 135 Mich. 136 13
——— *v.* Hildebrand, 71 Mich. 313 357
——— *v.* Hoffmann, 142 Mich. 531 357
——— *v.* Hurlbut, 24 Mich. 44 219
——— *v.* Jenness, 5 Mich. 305 358–360
——— *v.* Kemp, 76 Mich. 410 480
——— *v.* McKinney, 10 Mich. 54 ..... 542–545, 547
——— *v.* Murray, 89 Mich. 276 219
——— *v.* Neal, 143 Mich. 275 65
——— *v.* Perriman, 72 Mich. 184 357
——— *v.* Price, 74 Mich. 37 357
——— *v.* Railroad Co., 145 Mich. 140 206
——— *v.* Roat, 117 Mich. 578 357
——— *v.* Seaman, 107 Mich. 348 527
——— *v.* Seeley, 117 Mich. 263 545
——— *v.* Silberwood, 110 Mich. 106 ..... 64, 70
——— *v.* Taylor, 96 Mich. 576 537
——— *v.* Telford, 56 Mich. 541 ..... 229, 230

Digitized by Google

	PAGE
People *v.* Thacker, 108 Mich. 652	527
—— *v.* Tisdale, 1 Doug. (Mich.) 59	611
—— *v.* Treat, 77 Mich. 348	364
—— *v.* Waller, 70 Mich. 237	357
—— *v.* Warner, 116 Mich. 228	64, 70
—— *v.* Warren, 122 Mich. 504	546
——, *for use of* Hirth, *v.* Powers, 108 Mich. 339	135
——, —— Reynolds, *v.* Banhagel, 151 Mich. 40	136
——, —— Winkle Terra-Cotta Co., *v.* Cotteral, 119 Mich. 27	135
Pere Marquette R. Co. *v.* Gypsum Co., 154 Mich. 290–299	370
Perkins *v.* Fairfield, 11 Mass. 227	82
Perley *v.* County of Muskegon, 82 Mich. 138	540
Pettingill *v.* Bartlett, 1 N. H. 87	575
Philadelphia, *for use of* Taylor, *v.* Malone, 214 Pa. 90	333
Phillips *v.* Phillips, 88 Mich. 259	33
Phœnix Iron Works Co. *v.* Trust Co., 83 Fed. 757	453, 454
Pierson *v.* Railroad Co., 149 Mich. 167	111
Pike *v.* Pike, 121 Mich. 170	233
Plefka *v.* Railway, 155 Mich. 53	604
Pokriefka *v.* Mackurat, 91 Mich. 399	159
Porter *v.* Steel Co., 120 U. S. 649, 122 U. S. 267	454, 455
Post *v.* Campau, 42 Mich. 90, 95	247
Potter *v.* Railway, 88 Mich. 297	178
Powers *v.* Harlow, 53 Mich. 507	464
Pratt *v.* Burhans, 84 Mich. 489	586
Prescott *v.* Trueman, 4 Mass. 627, 629	247
Preston Nat. Bank *v.* Wayne Circuit Judge, 142 Mich. 272	211
Proctor *v.* Houghtaling, 37 Mich. 41	316
Pullman's Estate, *In re*, 46 App. Div. (N. Y.) 574	424
Pulte *v.* Wayne Circuit Judge, 47 Mich. 646	685
Pym *v.* Campbell, 6 El. & Bl. 370	555
Quartz Hill Gold Mining Co. *v.* Eyre, L. R. 11 Q. B. Div. 674, 52 L. J. Q. B. (N. S.) 488	373
Randall *v.* Railroad Co., 108 N. C. 612	569
Rapley *v.* McKinney's Estate, 143 Mich. 513	490
Rauch *v.* Insurance Co., 131 Mich. 281	678
Reading *v.* Waterman, 46 Mich. 107	141
Reed *v.* Gould, 105 Mich. 368	654
Regents of University of Michigan *v.* Auditor General, 109 Mich. 134	544
Renaud *v.* Bay City, 124 Mich. 29	159
Rex *v.* Rookwood, 13 How. St. Tr. 211	521
Reynolds, People, *for use of*, *v.* Banhagel, 151 Mich. 40	136
Rhoades *v.* Seidel, 139 Mich. 608	439
Richards *v.* Hayes, 17 App. Div. 422	44
Riddle *v.* Littlefield, 53 N. H. 503	295
Ritt *v.* Insurance Co., 41 Barb. (N. Y.) 353	675
R. J. Gunning Co. *v.* Cusack, 50 Ill. App. 290	295
Rivard *v.* Rivard, 109 Mich. 98	81
Robertson *v.* Pickrell, 109 U. S. 608	476
Robison *v.* Miner, 68 Mich. 549	206, 511
Rochester *v.* Telephone Co., 52 App. Div. (N. Y.) 6	196
Rockford Ins. Co. *v.* Winfield, 57 Kan. 576	675
Rolfe *v.* Dudley, 58 Mich. 208	142

Digitized by Google

PAGE
Roux *v.* Lumber Co., 94 Mich. 607 700
Rowland *v.* Doty, Har. Ch. (Mich.) 8 344
Ruberts *v.* Hathaway, 42 Mich. 502 670
Ruthe *v.* Railroad Co., 37 Wis. 344 141
Ryan *v.* Wayson, 108 Mich. 519 132

Sadowski *v.* Car Co., 84 Mich. 100 700
St. Joseph *v.* Seel, 122 Mich. 70 19
St. Louis, etc., R. Co. *v.* Yonley, 53 Ark. 503 282
Sayers *v.* Auditor General, 124 Mich. 260 320
Schmelzer *v.* Illuminating Co., 142 Mich. 133 402
School District No. Thirteen *v.* Dean, 17 Mich. 223 366
Schreiner *v.* United States, 6 Ct. Cl. 359 654
Scovel *v.* City of Detroit, 159 Mich. 95 234
Scripps *v.* Wayne Probate Judge, 131 Mich. 265 476
Seccombe *v.* Railway, 133 Mich. 170 648
Security Warehousing Co. *v.* Hand, 206 U. S. 415 656
Segar *v.* Lumber Co., 81 Mich. 344 670
Selby *v.* Railway, 141 Mich. 112 603
Shadford *v.* Railway, 130 Mich. 300 60
——— *v.* Railway Co., 111 Mich. 390 648
Shaw *v.* Hill, 79 Mich. 87 661
Shepard, *In re*, 109 Mich. 631 94
Sherwood *v.* Commissioner of State Land Office, 113 Mich. 227 70
Shietart *v.* City of Detroit, 108 Mich. 309 251
Showen *v.* Owens Co., 158 Mich. 321 128
Shumway *v.* Rutter, 8 Pick. (Mass.) 443 575
Shurbun *v.* Hooper, 40 Mich. 503 ..... 80, 82
Shute *v.* Township of Princeton, 58 Minn. 337 282
Sica, United States, *for use of*, *v.* Kimpland, 93 Fed. 403 333
Simons *v.* Diamond Match Co., 136 Mich. 592 245
——— *v.* Drill Co., 136 Mich. 592 243
——— *v.* Simons, 47 Mich. 645 390
Skinner *v.* Hoop Co., 119 Mich. 467 386
Smalley *v.* Gearing, 121 Mich. 190 ..... 268, 333
Smith *v.* Bell, 107 Pa. 352 379
——— *v.* Canfield, 8 Mich. 493 654
——— *v.* Smith, Sturgeon & Co., 125 Mich. 234 410
Smokey *v.* Peters-Calhoun Co., 66 Miss. 471, 475 575
Snider *v.* State, 81 Ga. 755 186
Spare *v.* Insurance Co., 19 Fed. 14 675
Sparrow *v.* E. Bement & Sons, 142 Mich. 441 410
Stack *v.* Cedar Co., 151 Mich. 21 76
Stadler *v.* Moors, 9 Mich. 267 670
Staffon *v.* Lyon, 104 Mich. 249 185
Standard Oil Co., United States, *for use of*, *v.* Security Co., 21 App. Cas. (D. C.) 369 332
Starkie *v.* Richmond, 155 Mass. 188 178
State *v.* Buffington, 20 Kan. 599 193
——— *v.* Cather, 121 Iowa, 108 511
——— *v.* Effinger, 44 Mo. App. 81 186
——— *v.* Falsetta, 10 Am. & Eng. Ann. Cas. 177, 179 193
——— *v.* Gilmanton, 14 N. H. 477 65
——— *v.* Hoyt, 47 Conn. 518 193
——— *v.* Mathers, 64 Vt. 101 193
——— *v.* Neslund, 141 Iowa, 461 10

Digitized by Google

PAGE
State *v.* Shooting Club, 127 Mich. 580 64
——— *v.* Spiers, 103 Iowa, 711 186
——— *v.* Teissedre, 30 Kan. 477 186
——— *v.* Tisdale, 54 Minn. 105 186
———, *ex rel.* County of Brown, *v.* Myers, 52 Wis. 628 .... 222, 224
———, *ex rel.* Ellis, *v.* Thorne, 112 Wis. 81 ..... 217, 224
State Road Bridge Co. *v.* Saginaw Circuit Judge, 148 Mich. 337 .. 402
Steere *v.* Vanderberg, 67 Mich. 530 142
Stenglein *v.* Saginaw Circuit Judge, 128 Mich. 440 392
Sterling *v.* Callahan, 94 Mich. 536 159
Stevenson *v.* Railway Co., 118 Mich. 653 109
Stever *v.* Brown, 119 Mich. 196 654
Stewart *v.* Calhoun Circuit Judge, 156 Mich. 642 229
——— *v.* McLaughlin's Estate, 126 Mich. 1 ..... 161, 162
——— *v.* Smith, 6 Cal. App. 152 236
Strauss *v.* Frederick, 91 N. C. 121 654
Strohauer *v.* Voltz, 42 Mich. 444 98
Suchocki *v.* Insurance Co., 158 Mich. 62 122
Sullivan *v.* Sullivan, 112 Mich. 674 240
Swan *v.* Thurman, 112 Mich. 416 125
Swett *v.* Boardman, 1 Mass. 262 556

Tangney *v.* Wilson & Co., 87 Mich. 453 44
Taylor *v.* Jones, 42 N. H. 25, 33 574
——— *v.* Township of Avon, 73 Mich. 604 277
———, City of Philadelphia, *for use of*, *v.* Malone, 214 Pa. 90 .. 333
Taylor-Woolfenden Co. *v.* Atkinson, 127 Mich. 633 125
Teed *v.* Martin, 41 Mich. 216 664
Terry *v.* Metevier, 104 Mich. 50 470
Tharp *v.* Allen, 46 Mich. 389 264
Thomas *v.* Gay, 169 U. S. 264 69
——— *v.* Railroad Co., 114 Mich. 59 701
Thompson *v.* Thomas, 11 Mich. 274 142
——— *v.* Waters, 25 Mich. 214 197
Thurstin *v.* Luce, 61 Mich. 292 430
Tobias *v.* Rogers, 18 N. Y. 59 655
Todd (A. M.) Co. *v.* Insurance Co., 137 Mich. 188 674
Toledo, etc., R. Co. *v.* Hamilton, 134 U. S. 296 454
Toll *v.* Wright, 87 Mich. 93 80
Toner *v.* Meussdorffer, 123 Cal. 462 438
Town *v.* Railroad Co., 84 Mich. 214 700
——— *v.* Thompson, 68 N. H. 317 438
Township of Ada *v.* Kent Circuit Judge, 114 Mich. 77 219
Township of Harrison *v.* Board of Sup'rs of Schoolcraft Co., 117 Mich. 215 366
Tradesman Co. *v.* Manufacturing Co., 147 Mich. 702 290
Trevelyan *v.* Trevelyan, 1 Phille. 149 555
Trowbridge *v.* Bullard, 81 Mich. 451 470
Trustees of Columbia College *v.* Thacher, 87 N. Y. 311 173
Turner *v.* City of Detroit, 104 Mich. 326 ..... 97, 98
——— *v.* Hart, 71 Mich. 128 173
Twigg *v.* Ryland, 62 Md. 380 166
Two Hundred Chests of Tea, 9 Wheat. (U. S.) 430 9

U. S. *v.* Ducournau, 54 Fed. 138 186
——— *v.* Railroad, 12 Wall. (U. S.) 362, 365 456

Digitized by Google

PAGE

U. S. *v.* Rodgers, 150 U. S. 249 66
———, *for use of* Briscoe, *v.* Surety Co., 28 App. Cas. (D. C.) 155 333
———, ——— Chapman, *v.* Surety Co., 28 App. Cas. (D. C.) 153 333
———, ——— Sica, *v.* Kimpland, 93 Fed. 403 333
———, ——— Standard Oil Co., *v.* Security Co., 21 App. Cas. (D. C.) 369 332
Urtel *v.* City of Flint, 122 Mich. 65 251

Van Benschoten *v.* Fales, 126 Mich. 176 141
Van Dusen *v.* Letellier, 78 Mich. 492 699
Van Dyke *v.* Davis, 2 Mich. 145 664
Van Voorhis *v.* Van Voorhis, 90 Mich. 276 390
Veit *v.* Railroad Co., 150 Mich. 358 ..... 645, 648, 649
Vier *v.* City of Detroit, 111 Mich. 646 17
Village of Carthage *v.* Telegraph Co., 185 N. Y. 448 196
Village of Essexville *v.* Emery, 90 Mich. 188 17
Vincent *v.* City of Kalamazoo, 111 Mich. 230 17
Vitali, *In re*, 153 Mich. 514 631
Vrooman *v.* Michie, 69 Mich. 42 611

Waite *v.* Frisbie, 45 Minn. 361 556
Wakeham, *In re*, L. R. 13 Q. B. Div. 43 654
Walker *v.* City of Ann Arbor, 111 Mich. 4 259
Walter *v.* Insurance Co., 120 Mich. 35 678
Ward *v.* Oliver, 129 Mich. 300 192
——— *v.* State, 70 Ark. 204 192
Wardle *v.* Hudson, 96 Mich. 432 379
Warner *v.* Comstock, 55 Mich. 618 670
Watson *v.* Alberts, 120 Mich. 508 454
——— *v.* Almirall, 61 App. Div. (N. Y.) 429 ..... 438, 441
——— *v.* E. E. Naugle Tie Co., 148 Mich. 675 175
Waterman *v.* Seeley, 28 Mich. 77 344
Wayne County Road Com'rs *v.* Board of Auditors, 148 Mich. 255 219
Wedderburn *v.* City of Detroit, 144 Mich. 684 252
Weed *v.* Terry, 2 Doug. (Mich.) 344 664
Wehrum *v.* Kuhn, 61 N. Y. 623 664
Weisman *v.* Newton Beef Co., 154 Mich. 511 81
Weisse *v.* City of Detroit, 105 Mich. 482 251
Wellington *v.* Sedgwick, 12 Cal. 476 576
Welsh *v.* State, 126 Ind. 71 186
Wetherbee *v.* Green, 22 Mich. 311 578
Whalen *v.* Railroad Co., 114 Mich. 512 648
Wheeler *v.* Berry, 95 Mich. 250 647
Whitaker *v.* Whitaker, 111 Mich. 202 501
Whitcomb *v.* State, 2 Tex. Civ. App. 301 186
Whitney *v.* Cooper, 1 Hill (N. Y.), 629 208
——— *v.* Robertson, 124 U. S. 190 69
Wickes Bros. *v.* Hill, 115 Mich. 333 454
Wigent *v.* Marrs, 130 Mich. 609 139
Wiggins *v.* Snow, 89 Mich. 476 132
Wildberger *v.* Insurance Co., 72 Miss. 338 675
Wilkinson *v.* Dunkley-Williams Co., 141 Mich. 409 ..... 608, 609

Digitized by Google

PAGE
Willard *v.* Van Leeuwen, 56 Mich. 15 421
Williams *v.* Brown, 137 Mich. 569 ..... 348, 573
——— *v.* Neely, 134 Fed. 1 41
——— *v.* West Bay City, 119 Mich. 395 159
Williamson *v.* Yager, 91 Ky. 282 490
Willoughby *v.* Lawrence, 116 Ill. 11 295
Winkle Terra-Cotta Co., *People for use of*, *v.* Cotteral, 119 Mich. 27 135
Witham *v.* Clinton Circuit Judge, 150 Mich. 568 ..... 508, 642
Woodmere Cemetery Ass'n *v.* Township of Springwells, 130 Mich. 466 201
Woolkins *v.* Haid, 49 Mich. 299 142
Worden *v.* Manistee Circuit Judge, 88 Mich. 111 685

Yotter *v.* City of Detroit, 107 Mich. 4 251
Young *v.* Young, 80 N. Y. 422 490

Zess, City of Alpena, *for use of*, *v.* Surety Co., 158 Mich. 678 331
Zibble *v.* Zibble, 131 Mich. 655 559
Zielke *v.* Morgan, 50 Wis. 567 577
Zimmer *v.* Board of Sup'rs of Bay Co., 159 Mich. 213 227
Zimmerman *v.* Insurance Co., 110 Mich. 399 675
Zuehlke *v.* Stone, 148 Mich. 478 577

Digitized by Google

LAWS CITED AND CONSTRUED.

UNITED STATES STATUTES.

	PAGE		PAGE
28 U. S. Stat. 278	332	34 U. S. Stat. 768	4
29 U. S. Stat. 54	69	34 U. S. Stat. 771, § 8, subd. 4	7

CONSTITUTION OF MICHIGAN.

	PAGE		PAGE
(1850) Art. iv, § 20	204, 510	Art. vii, § 1	217
Art. v, § 21	212	(1850) Art. xiv, § 12	218

REVISED STATUTES 1838.

	PAGE
Pp. 29, 90, 98	541

COMPILED LAWS 1857.

	PAGE
P. 160	541

HOWELL'S STATUTES.

	PAGE
Vol. 2, § 6647	390

COMPILED LAWS 1897.

	PAGE		PAGE
§§ 78	540	§§ 9270	558
448	344	9282–9284	477
650	477	9354	661
918	101	9375	81
1189, 1190	539, 542	9520, 9521	684
1197	543	10015 *et seq.*	168
1197–1204	454, 539	10117	271
1201	538, 539, 543, 544, 546	10188	31
2108	630	10193	430
2415 *et seq.*	274	10212	233
2684 *et seq.*	321	10213	113, 192
2956–3871	365	10216	168
3846	347	10427	271
3876	201	10556	469
4042, 4043	222	10577	505
4163	564	10710	452
4707	222	10713	268
4857	75	10743–10745	124, 330, 331
5012	3, 5	10924 *et seq.*	224
5379–5446	510	11281	208
6336	454, 456	11536 *et seq.*	284
6426	453	11585	561
6667–6687	197	11612	530
7317–7336	375	11614	544, 546
8622, 8623	238, 239	11653–11658	284
8686	616	11693	629, 631
9078 *et seq.*	206	11785	629, 631
9262, 9265, 9266	557	11919, 11936	357

Digitized by Google

SESSION LAWS.

	PAGE
2 Terr. Laws, p. 743	541
1835–36, pp. 8, 9, 43, 61, 62, 63, 148	541
1839, pp. 58, 120	541
1847, Act 4	197
1851, Act 59	197
1853, pp. 71, 88	541
1855, Act 105	539
—— p. 238	541
1861, pp. 31, 150, 583	541
1863, p. 351	541
1873, Act 14	197
1875, Act 131	539
1879, Act 374 (Local) 96, 98,	99
1883, Act 129	197
1885, Act 153, § 42	277
—— Act 227	278
1887, Act 313	510
1889, Act 388 (Local) 98,	99
1895, Act 193, § 2	11
—— —— § 3	4
—— —— §§ 4, 7	6
—— Act 215	365
1897, Act 121	204
1899, Act 272	222
1901, Act 143	60
1903, Act 17	452
1903, Act 17, § 1	267
—— Act 30	184
—— Act 34	128
—— Act 123	13
—— Act 195, § 17 422,	424
—— Act 472 (Local) 365,	366
—— Act 475 (Local)	131
1905, Act 261	206
—— Act 309, § 10	212
—— Act 310	92
—— Act 661 (Local) 365,	366
1907, Act 161	212
—— Act 187	637
—— Act 310, § 4	196
—— Act 312	580
—— —— § 17 568,	569
—— Act 324	239
—— Act 340	642
—— —— §§ 2, 6	643
—— Act 525 (Local)	149
1909, Act 67	212
—— Act 209, § 3	204
—— —— § 4 205,	206
—— Act 292 214, 221, 225,	226
—— Act 299, § 2	390
—— —— §§ 4, 6	608
—— Act 300	580

CIRCUIT COURT RULE.

	PAGE
No. 24c	286

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OCTOBER TERM, 1909.*

ARMOUR & CO. *v.* STATE DAIRY AND FOOD COMMISSIONER.

1. FOOD—ADULTERATION—STATUTES—SAUSAGE.
   The sale by retailers to consumers of sausage made with the addition of cereal, and not labeled so that the public may know of the combination, although the product is properly labeled in the original package purchased at wholesale, is illegal under Act No. 193, Pub. Acts 1895, 2 Comp. Laws, § 5010 *et seq.*, being an adulteration within the prohibition of the act.

2. SAME—SAUSAGE—WORDS AND PHRASES—PURE FOOD LAWS.
   Sausage made of chopped pork, beef and veal with a filler of cereal, seasoned with salt and spices, and mixed with pure water, is not unwholesome or injurious to the health, and may be sold as a mixture or compound within the meaning of the statute, when labeled in such a manner as to show the consumer that it contains cereal.

3. SAME—SAUSAGE—WORDS AND PHRASES.
   Sausage is an article of food composed of meat, salt, and spices.

4. STATUTORY CONSTRUCTION — STATUTES — ORDINARY AND TRADE MEANINGS.
   In construing such statute the court will adopt the meaning of the word sausage which is generally understood and intended, not a meaning peculiar to the trade or to certain manufacturers.

Appeal from Ingham; Wiest, J. Submitted October 7, 1909. (Docket No. 20.) Decided December 10, 1909.

Bill by Armour & Company against Arthur C. Bird, State dairy and food commissioner, and others, to restrain

*Continued from Vol. 158.

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defendants from interfering in the sale of sausage in the State. From a decree dismissing the bill, complainant appeals. Modified.

Gore & Harvey (*Thomas, Cummins & Nichols, Ralph W. Shauman*, and *A. R. Urion*, of counsel), for complainant.

John E. Bird, Attorney General (*Charles W. McGill* and *George S. Law*, of counsel), for defendants.

Complainant is a corporation organized under the laws of the State of New Jersey, with headquarters in Chicago, Ill. It is, and has been for many years, engaged in the manufacture and sale of fresh and cured meats and sausage and other meat products. Its sale of these products, including sausage, extended over the entire State of Michigan. In the year of 1906 the defendant the dairy and food commissioner caused chemical examination to be made of the various brands of sausage sold within the State, including that of the complainant, and found that many of them contained cereals and a percentage of water greater than that found in meat alone. On January 16, 1907, he issued the following circular:

"*Gentlemen:* A growing tendency on the part of manufacturers of sausage, bolognas, and similar meat products, to use various preparations and substances foreign to the legitimate ingredients necessary to the manufacture of these articles of food, the said preparations being commonly known and designated as fillers, binder, etc., has prompted this department to make a thorough investigation into such sausages. This has been done for the purpose of ascertaining the true reasons for the widespread practice of using the preparations mentioned.

"The results obtained from the investigation as carried on in the department laboratory lead to but one conclusion, viz., that the addition of so-called binders and fillers to meat products is primarily for the purpose of substituting in part an inferior or cheaper substance for a legitimate ingredient, thereby lessening the cost of manufacture.

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"The first and second subdivisions of section 5012 of the Compiled Laws provide that an article shall be deemed to be adulterated within the meaning of the act—*first*, if any substance or substances have been mixed with it so as to lower or depreciate or injuriously affect its quality, strength or purity; *second*, if any inferior or cheaper substance or substances have been substituted wholly or in part for it.

"Basing its ruling on the subdivisions of section 5012 above cited, this department holds that the addition of the so-called binders and fillers mentioned to meat products is contrary to law. From and after this day manufacturers and dealers will be held to a strict account for each and every violation. Provided, however, that dealers within the State are given until January 25, 1907, to dispose of stocks on hand. "Yours very truly,

"A. C. BIRD,

"State Dairy and Food Commissioner."

This circular was sent to all the meat dealers of the State, and a copy sent to the complainant at Chicago. Those employed under the direction of the defendant food commissioner also verbally informed the retail dealers of the State that they would be prosecuted if they did not comply with the above order.

The trade of the complainant in Michigan was very large, and the effect of this circular, and the threats of prosecution verbally made, naturally tended to decrease very largely the complainant's sales in this State, and to cause it considerable loss. Therefore, on November 18, 1907, complainant filed its bill of complaint in this cause, setting forth the above circular and threats on the part of the defendants, the injury to its business, that defendants were acting illegally in their conduct, and praying that they be restrained from—

"Declaring in any manner, orally or in writing, to the customers and patrons of your orator, or to the people of the State of Michigan, that the sausages and other meat products of your orator containing cereal manufactured and sold, and offered for sale in the State of Michigan, are sold and offered for sale in violation of any statute of the State of Michigan."

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The bill alleges that the sausage manufactured and sold by the complainant bear labels showing their respective ingredients in accordance with the standard fixed by the laws of the United States and the regulations of the department of agriculture thereunder; a sample of said labels being set forth in the bill and reading as follows:

ARMOUR'S
"DEVONSHIRE"
Farm Style
SAUSAGE MEAT.
Made from the Meat of Hams and
Selected Young Pork. Prepared with
Choicest spices and cereals.
Armour & Company.

U. S. Inspected and passed under the
Act of Congress of June 30, 1906.
Establishment 2 A.

An answer was duly filed denying that the sausage manufactured and sold by the complainant in this State containing cereals and water is a wholesome product, or that it is manufactured in accordance with Act Cong. June 30, 1906, chap. 3915, 34 Stat. 768 (U. S. Comp. Stat. Supp. 1909, p. 1187), and the regulations of the United States department of agriculture, or that it is a compound or mixture within the meaning of the proviso of section 3, Act No. 193, Pub. Acts 1895, as amended. The answer admits that the sausage of the complainant is shipped into this State in packages, or boxes, labeled with the tradename of the sausage, and the words "with cereal," but alleges that the consumer or purchaser of the retail dealer is in no way advised, when he purchases, that the sausage contains cereal, or cereal and added water, unless such purchaser purchased the entire package shipped to the dealer, and that even then he was not informed that the product contains added water.

Both the bill and answer contain other allegations which we deem it unnecessary to state. Issue was joined, proofs taken in open court and by deposition, and, after a

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full hearing, decree was entered dismissing the bill. The statute (2 Comp Laws, § 5012) under which defendants claim to justify their action is as follows:

"An article shall be deemed to be adulterated within the meaning of this act: *First*, if any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its quality, strength or purity; *second*, if any inferior or cheaper substance or substances have been substituted wholly or in part for it; *third*, if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it; *fourth*, if it is an imitation of, or is sold under the name of another article; *fifth*, if it consists wholly or in part of a diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article, whether manufactured or not, or, in the case of milk, if it is the product of a diseased animal; *sixth*, if it is colored, coated, polished, or powdered whereby damage or inferiority is concealed or if by any means it is made to appear better or of greater value than it really is; *seventh*, if it contains any added substance or ingredient which is poisonous or injurious to health: *Provided*, That nothing in this act shall prevent the coloring of pure butter: *And provided further*, That the provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, if each and every package sold or offered for sale bear the name and address of the manufacturer and be distinctly labeled under its own distinctive name, and in a manner so as to plainly and correctly show that it is a mixture or compound, and is not in violation with definitions fourth and seventh of this section."

GRANT, J. (*after stating the facts*). The following facts are admitted or established beyond controversy:

(*a*) The sausage manufactured by the complainant is a wholesome article of food. It contains nothing deleterious to health.

(*b*) It is a mixture or compound within the meaning of the proviso in the statute above quoted, being composed of meat, cereal, salt, and spices.

(*c*) It is made in accordance with the act of congress and directions prescribed thereunder by the commissioner of agriculture, and under the inspection of the United States inspectors.

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(*d*) Sausage is made of different kinds of meat, viz., pork, beef, and veal. Whether manufactured for interstate commerce or domestic use within the State, it is sometimes made with cereal, and sometimes without it. Cereal is not a necessary ingredient to its manufacture, although it has been used by most manufacturers for many years.

(*e*) Water is an essential ingredient in the manufacture of sausage, whether made with or without cereal.

This is shown by the evidence of the defendants. One of their witnesses, with an experience of 35 years, testified:

"In the manufacture of pork sausage we use pork, and, if the pork is a little too fat, we put in some veal or beef. * * * It is necessary to have a little water added, a quart and a half to 100 pounds. It is pretty hard to make them without. We use a little more water than would be found in the meat when freshly killed."

Another, who has been engaged in the manufacture of sausage since 1864, testified:

"I put a little water in pork sausage. I use from 5 to 10 pounds of water to 100 pounds of meat. Enough to make it pliable, that is all. I use from 8 to 10 pounds of water in making beef sausage. I presume you could make sausage without water, but you could not stuff it very well."

Another, who learned to make sausage in Germany, testified:

"I have always used water, and still use water in the manufacture of sausage. Water is necessary. They use water in making sausage in Germany. So far as I know, every one used it."

The United States regulations require that the water used shall be pure.

(*f*) It is not in violation of definitions 4 and 7 of the act.

It does not violate definition 7 because it contains no substance or ingredient poisonous or injurious to health. It does not violate definition 4 because meat is the basis

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and principal ingredient of the article. As manufactured by complainant, it contains from 2 to 10 per cent. of cereal. It is and has been for more than 40 years recognized in the trade as sausage. When sold as sausage with cereal added, it deceives no one, is not an imitation, and manufacturers are entitled to manufacture and label it as sausage with cereal. It is not contended that manufacturers have not the right to use the name "sausage" when sold with a proper label.

The Federal statute is practically identical with that of Michigan, and contains a proviso reading:

"That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: *First.* In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced." 34 U. S. Stat. p. 771, § 8, subd. 4 (U. S. Comp. Stat. [Supp. 1907], chap. 3915, § 8, subd. 4).

Acting under this law, the department of agriculture, on September 12, 1906, adopted the following regulation:

"Sausages and Chopped Meats. The word 'sausage' without a prefix indicating the species of animal is considered to be a mixture of minced or chopped meats with or without spices. If any species of animal is indicated as pork sausage, the sausage must be wholly made from the meat of that species. If any flour or other cereal is used the label must so state. If any other meat product is added, the label must so state."

To this regulation the department added "manufacturers are warned that the above rulings do not exempt them from the enforcement of State laws." The learned circuit judge in his opinion found that sausage manufactured as is that of the complainant "is probably as healthy as pure sausage such as was known to the fathers."

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Briefly stated, then, the case is this: Complainant, a resident of another State, is manufacturing and shipping into this State a wholesome article of interstate commerce in strict accord with the law and regulations of the Federal government. State law cannot interfere with this interstate traffic. The law here involved does not attempt to interfere with it, or to deny to the complainant the right to sell and ship its goods to retail dealers in this State. There are, therefore, but two questions material to the determination of this controversy, viz.:

(1) May the State through its legislature enact laws regulating the domestic sales of this product to consumers within the State?

(2) Does the statute above cited include the product made by the complainant?

It is not contended that the State is not clothed with the power to regulate the domestic sale of such products after their shipment into the State. Intoxicating liquor, which is a subject of interstate commerce, may be shipped into this State in original packages, but it cannot be sold within the State in violation of the State laws regulating or prohibiting its sale. No contention is made that the State statute in question is not constitutional and reasonable. Pure food laws have been enacted probably in all the States, and have been universally held valid when reasonable. The sole question, therefore, left to determine, is whether the statute includes sales to consumers in small quantities taken from the original packages. If the domestic dealer were to sell an original package labeled as above to the consumer, such sale would be valid, because the label complies with the law and notifies the purchaser that the article is not a sausage of meat alone, but a sausage composed of meat and cereal. It is not contended that manufacturers of sausage have not the right to label their product "sausage" with the statement added that it is mixed with other products, specifying them.

If we understood the position of counsel for complain-

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ant correctly, it is that in construing this statute courts should be governed, not by the popular and common understanding of the meaning of the word "sausage," but by its trade and commercial meaning; that is, its meaning as understood between the manufacturers and their customers to whom they sell for retail to consumers. They say:

"It is unmistakable that the legislature understood it was enacting a law with reference to an article of food which was then a subject of trade and commerce among the people. There were at times scores of different kinds of 'sausage' upon the market; that is, sausage made in different ways, a difference in the ingredients used in the various kinds, and a variance in the proportions used; and different manufacturers and dealers made and dealt in different kinds, and each knew that all this variety of meat food products were included in the term 'sausage,' and the legislature is charged with knowledge of that fact, and must be presumed to have used the term 'food' accordingly."

In support of this, they cite several cases from the Federal courts construing the tariff or duty acts, in which it has been held that the laws of congress imposing duties upon imported goods must be construed with reference to the trade or commercial meaning of the articles mentioned in the law. Among the cases cited are *Two Hundred Chests of Tea*, 9 Wheat. (U. S.) 430; *Cadwalader* v. *Zeh*, 151 U. S. 171 (14 Sup. Ct. 288); *McCoy* v. *Hedden*, 38 Fed. 89.

In *Two Hundred Chests of Tea* it was held that "bohea tea" was used in the duty act in its known commercial sense, viz., "that article which in the known usage of the trade acquired that distinctive appellation."

In *Cadwalader* v. *Zeh* the question was whether under the duty act earthenware consisting of small cups, saucers, mugs, etc., having on them pictures of animals and other objects, and letters of the alphabet, should have been assessed as toys with 35 per cent. *ad valorem*, or as china, etc., with 60 per cent. *ad valorem*. The case was held

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to depend upon the commerial meaning of the word "toys."

In *McCoy* v. *Hedden* the question was whether curry-combs were dutiable under a provision imposing a duty upon combs of all kinds. If they were not known to the trade among merchants as combs, they were held not dutiable as such. These and other similar cases arose between the United States and importers of foreign goods, and do not apply to cases arising under the pure food laws of State governments. Courts will take cognizance of the well-known fact that farmers, laboring men, and consumers are not generally familiar with the customs of trade and commerce in importing goods, or of understandings of the trade between manufacturers and merchants who buy those products for retail trade. Such construction would emasculate the pure food laws, and deprive the people of the protection which the legislature wisely intended to give them.

"Sausage" is defined by all the lexicographers as an article of food composed of meat, salt, and spices. See Worcester's and Century Dictionaries. The people generally so understand it. The writer of this opinion would be compelled to admit that until very recently he had no knowledge that cereal was used in the manufacture of sausage. It is too manifest for further argument that the legislature in enacting the law was not providing for the regulation of sales between manufacturers and merchants, but between retail dealers and consumers. They enacted the law solely for the protection of consumers—the people who buy and eat the products. The consumer who prefers sausage made of meat alone is entitled to be informed that he is buying such an article. The consumer who prefers sausage mixed with cereal is entitled to know that he is purchasing that article. The contention of the complainant, if sustained, would deprive the consumer of this right which the statute plainly gives him. We cannot follow *State* v. *Neslund*, 141 Iowa, 461 (120 N. W. 107), wherein it is held that sales in small quantities from orig-

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inal packages are not within the statute. In that case a pound of lard was sold from a 50 pound package properly labeled with its constituent parts, but it was held that the retail dealer was not required to label the small packages sold. That opinion is based upon the well-known rule that penal statutes must be strictly construed. The statute of Michigan expressly provides that these mixtures must be labeled showing the different kinds of ingredients contained in them. Section 2 of Act No. 193, Pub. Acts 1895, is as follows:

"The term food, as used herein, shall include all articles used for food or drink, or intended to be eaten or drank by man, whether simple, mixed, or compound."

This is a general statute covering all food products not otherwise specifically provided for. We consider its provisions perfectly plain, and not subject to any misunderstanding or uncertainty. To hold otherwise would substantially exclude all the benefits and protection to the people of the State which the statute was clearly designed to grant. We therefore hold that retail packages of small amounts taken from the original package of the manufacturer, and sold to the consumer, must be properly labeled as the law directs.

The court below dismissed the complainant's bill, thereby granting it no relief whatever. In view of the position taken by the food commissioner in his circulars and answer herein filed, and in view of the importance to the complainant, and to the people of the State to know under what conditions a wholesome article of interstate commerce may be sold in this State, we think the learned circuit judge should have entered a decree defining the rights and determining under what conditions complainant, as well as other manufacturers, may have their valuable and wholesome products sold by the retail dealers, and to restrain the defendants from interfering with such legitimate sales.

The food commissioner, as above stated, denied in his

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answer that the sausage made by the complainant was a wholesome product, or that it was a mixture or compound within the meaning of the act, and insisted that it was an adulteration. His attitude is further shown by his reply to complainant's letter of January 17, 1907, asking "if there would be any objection to using cereal if such fact is stated on label same as provided by National law." He denied this permission, which was not only a compliance with the Federal law, but a compliance with the State law.

The use of cereal in the manufacture of sausage has been very general. The State food and dairy commissioner of Iowa, who at the time of the hearing below had held office for five years, testified to its general use in that State, stating that "the ingredients used by the Iowa manufacturers in making sausage are chopped meats, salt, spices, flour and sufficient water." In July, 1907, he issued a bulletin stating:

"The commissioner has no authority to establish standards for the information of the public. It is here stated that this department will not interfere with the sale of sausage because of the presence of wholesome flour, provided that an analysis does not show more than five per cent. of such flour."

It appears to be established by the evidence that sausage made with cereal is sold cheaper than that made of meats alone. If so, the people desiring to buy and eat the cheaper product should have the privilege of doing so, and such product should not by any decision of the court be prohibited from sale.

The opinion of the circuit judge does not prohibit its sale when properly labeled. He held that the trouble was not with the use of cereal, but in permitting the product to be sold at the retail counter without informing the customer that cereal is a part of it. Counsel for respondents conceded in the oral argument in this court that it was a wholesome food and was entitled to sale in this State when

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sold under a proper label informing customers of what it is composed.

It is conceded that the use of cereal requires more water than does sausage made with meat alone. Anyone of intelligence would, upon reflection, know this to be the fact. The only doubt I entertain in the case is whether the label should, in addition to the words "with cereal," contain also "and water." In view of the fact that water is generally used in the manufacture of all sausage, and that no law or regulation of the food department has fixed the amount of water that may be used, it would seem like judicial legislation for the court to require the label to show that water is used in the manufacture. The statute does not require the label to state the proportion of the ingredients composing the mixture, but only the names of the ingredients. The statute makes special provision for butter, cheese, lard, canned fruits and vegetables, coffee, and molasses. There are other statutes governing the manufacture and sale of specific products requiring the proportions of the ingredients to be placed upon the labels, such as Act No. 123, Pub. Acts 1903. *People* v. *Harris*, 135 Mich. 136 (97 N. W. 402). It is within the power of the legislature to pass an act specifically providing for the manufacture and sale of sausage, and that the labels should state the proportions of the ingredients used. We hold a label "sausage with cereal" upon packages sold to consumers is a compliance with the statute in labeling the mixture, and a decree should be entered so stating.

The decree will be modified and a decree entered in this court in accordance with the above opinion. No costs will be allowed.

BLAIR, C. J., and MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

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WEBER *v.* CITY OF DETROIT.

1. ADVERSE POSSESSION—STATUTE OF LIMITATIONS—STREETS AND ALLEYS—PERMISSIVE USER.

   Occupancy of an alley by a lumber dealer who piled his lumber, which was continually being changed or removed, partly in the alley and partly on his own land, both being portions of a common at the time of purchase, constitutes a permissive user of the unused public way and not adverse possession, in the absence of a claim or color of title.

2. SAME.

   To transform a permissive use into an adverse one there must be a distinct and positive assertion of a right hostile to the rights of the owner, and such assertion must be brought to his attention.

3. SAME.

   No rights are acquired by the public in land owned by a complainant who built a fence to keep people out of his lumber yard, not on the line of the alley but within the boundary of his own property, and without any reference thereto.

Appeal from Wayne; Murphy, J. Submitted October 14, 1909. (Docket No. 84.) Decided December 10, 1909.

Bill by Joseph F. Weber against the city of Detroit and others to quiet title to land. From a decree for complainant, defendants appeal. Reversed.

Jasper C. Gates, for complainant.

Walter Barlow (*P. J. M. Hally*, of counsel), for defendants.

The public alley in which is situated the pieces of land now in controversy is in a block of the city of Detroit bounded on the north by Gratiot avenue and Maple street, on the east by Rivard street, on the south by Sherman street, and on the west by Hastings street. The alley ex-

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tends from Sherman street in a northwesterly direction to near the middle of the block parallel to Gratiot avenue, from which point it extends east to Rivard street. Complainant owns the east half of lot 190, the entire of lots 191, 192, 193, and 194; the first four lots fronting on Gratiot avenue, while lot 194 fronts on Maple street. He also owns lots 183, 184, and 185, fronting on Sherman street. These lots are situated to the south of the alley, while the lots first named are to the north of the alley.

This is a public alley, and the defendant city entered into a contract for paving it. The contract covered land as platted, but to which the complainant claims title by adverse possession. Four pieces or strips of land are involved, two upon the north of the alley and two upon the south. Counsel for defendants concede that complainant has obtained title by adverse possession to the strips north of the alley, which have been for more than twenty years occupied by his buildings.

Complainant purchased lots 183, 184, and 185 in 1869. The entire land there then was an open common. There were no stakes or other monuments locating the alley. Complainant used lots 184 and 185 as a lumber yard. He made no attempt to find the south boundary of this alley, or to locate the lumber piles with any reference thereto, but, it being an open common, located them at his pleasure. These lumber piles encroached upon the alley. His occupancy is solely that of the lumber piles piled upon pieces of timber laid on the ground. These piles were constantly changing as they were sold and repiled with other lumber. At the extreme western end of lot 185 he located four posts, which, it appears, have been there many years. One of these posts was in the southern line of the alley and on the south line of Sherman street. The other three were located in the alley at irregular distances from the south line of the alley as platted. This alley has been in daily use by the public and the complainant. Complainant describes his occupancy as follows:

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"*Q.* These irregular lines on this Exhibit 2, marked 'post and lumber piles,' these are movable?

"*A.* Yes, sir. North of lots 185 and 184 these are movable lumber piles and piles of posts. They comprise part of our stock in trade there. They are merchandise. I don't suppose the identical posts and piles of lumber that the map shows were there 40 years ago. It is likely some of the foundations went down in the ground, maybe. The material itself that is above the surface is all the time changing. Sometimes there is more and sometimes less there. Whenever we bring in new material there, we pile it up there, and, whenever we sell it, we take it from those piles. * * *

"*Q.* But that stuff there now is all merchantable stuff?

"*A.* Yes, sir. I don't think there would be any lumber there that was there 15 years ago, but I would not be so sure about the house blocks in the bottom there. There might be some of those there. * * *

"*Q.* But, as a usual thing, they are not there but a few months?

"*A.* Oh, yes; longer than a few months. Sometimes they would be moved two and three times a year. Sometimes they wouldn't be. It would depend upon the use and sale of the particular kinds of lumber. That is the way that has been occupied for 40 years north of that line of fence in the rear of lots 184 and 185. It has not been occupied in any other way by me, except in that particular way."

When the city was preparing to pave this alley, it claimed that the space occupied by the complainant's lumber piles was in the alley. Complainant thereupon filed this bill to quiet title. The court entered a decree for complainant.

The irregularity of the northerly boundary of the strip claimed appears from the description found in the decree, as follows:

"Beginning at the southwest corner of lot 185, of the plat of the subdivision of the Louis Moran farm, between Fort and Elizabeth streets; thence south 60 deg. 00′ west along the northerly line of Sherman street 1.20 feet; thence north 60 deg. 14′ west, 4.00 feet, to a post standing in the ground; thence north 10 deg. 30′ east, 9.53 feet, to a post; thence north 45 deg. 02′ east, 7.26 feet; thence

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north 3 deg. 55′ west, 3.60 feet; thence north 47 deg. 25′ east, 19.41 feet; thence north 53 deg. 07′ west, 4.03 feet; thence north 46 deg. 28′ east, 10.44 feet; thence north 60 deg. 14′ west, 1.00 foot; thence north 30 deg. 37′ east, 40.00 feet; thence north 29 deg. 46′ east, 14.6 feet; thence south 60 deg. 14′ east, 3.36 feet, to the northwesterly line of said lot 185; thence north 29 deg. 46′ east, along the last said line, 20.4 feet; thence north 60 deg. 14′ west, 3.40 feet; thence north 29 deg. 46′ east, 17.75 feet; thence north 50 deg. 14′ west, 1.00 foot; thence north 29 deg. 46′ east, 17.75 feet; thence south 60 deg. 14′ east, 4.40 feet, to the northwesterly line of said lot 185; thence south 29 deg. 46′ west, along the last said line, to point of beginning.".

GRANT, J. (*after stating the facts*). Counsel for complainant cites and relies upon the following authorities: *Gregory* v. *Knight*, 50 Mich. 61, 63, 64 (14 N. W. 700); *Village of Essexville* v. *Emery*, 90 Mich. 183, 185, 186 (51 N. W. 204); *Flynn* v. *City of Detroit*, 93 Mich. 590 (53 N. W. 815); *Leonard* v. *City of Detroit*, 108 Mich. 600, 601, 602 (66 N. W. 488); *Vier* v. *City of Detroit*, 111 Mich. 646, 647, 648 (70 N. W. 139). In *Gregory* v. *Knight* the land was occupied by a "rail fence, stone-row, rail piles, hay barn, and sheds." In *Flynn* v. *City of Detroit* a house was standing about one foot upon the land in controversy, and the balance of the strip was inclosed by a picket fence completely inclosing it with no opening from the street into it. In *Vincent* v. *City of Kalamazoo*, 111 Mich. 230 (69 N. W. 501), the strip of land involved had been covered by a building for 30 years. In *Vier* v. *City of Detroit* the opinion states that the case possesses the essential features of *Vincent* v. *City of Kalamazoo*, *supra*.

Referring to that case, it will appear that the ground in controversy had been covered with buildings for about 30 years. In this case there are no buildings or permanent improvements. The ground was occupied exclusively by personal property which complainant placed there for his own convenience for sale, and which was

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constantly changing. The merchandise thus placed was changed from three to four times a year. As soon as one pile was sold, it was replaced with other lumber. There was nothing in appearance to indicate a permanent, hostile, or adverse possession. It is common knowledge that merchants are permitted, without objection by the public, to occupy parts of streets and sidewalks in front of their stores to exhibit goods for sale. It has never been held that by so doing they could acquire title by adverse possession. They occupy these portions of the public thoroughfares by permission, and not in hostility to the public. The ground when the plaintiff purchased it was an open common. He did not know where the line was. He purchased his lots by number, and therefore with reference to the plat, which showed that they were bounded on the south by Sherman street and on the north by the alley. He took no pains, however, to ascertain that line or to pile his lumber in accordance with any straight line. Some piles extended into the alley farther than others. That he supposed, when he began to pile his lumber, that he was occupying his own land upon the south side of the alley, is absurd. As shown in the description of the land in the decree, the northern boundary of the strip is a zigzag line extending from the west corner of lot 185 through the alley to a point at or near the northeast corner of said lot, while the southern boundary of the strip is the lot line as platted. He could not have believed that he was occupying land to which he had any title. The apparent fact is that he entered upon this land, then an open common, without any view of his own lot line. No one was interested to complain. He notified no one that he occupied this land with his lumber piles under claim or color of title. He had no claim or color of title. The presence of this movable personal property, placed there for his own convenience in selling and moving, is no notice of any claim or title, or of a possession hostile to the rights of the public. His statement that he claimed title is of no consequence. Title to lands cannot be maintained by an

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unexpressed claim existing in the mind of the claimant. His adverse possession could only commence when he had in some manner notified the public of his adverse claim. *City of St. Joseph* v. *Seel*, 122 Mich. 70, 74 (80 N. W. 987).

"The occupancy must be exclusive, known to, and against the will and consent of, those interested, and whose right it is to contest." *Marble* v. *Price*, 54 Mich. 466 (20 N. W. 531).

We said in *Fuller* v. *City of Grand Rapids*, 105 Mich. 529 (63 N. W. 530):

"Owners of adjacent lands acquire no permanent rights in the public streets by the erection of structures for their own use and benefit. So long as the space so occupied is not required for public use, they are usually permitted, but, when the public demands it for the use for which it has been condemned or dedicated, the private use must go, and the structures be removed. The opportunity to remove them is all the right the law gives the owners."

The language there used is, of course, subject to acquiring title by adverse possession under the authorities above cited.

Under complainant's contention, every occupancy by an adjoining owner of the unused portion of a public highway or street along its sides for the storage or display of merchandise would result in depriving the municipalities of a portion of their streets if such occupancy were continued for the statutory period. Such holding is not in accord with authority or sound reason.

"To transform a permissive use into an adverse one there must be a distinct and positive assertion of a right hostile to the rights of the owner and such assertion must be brought to his attention." 14 Cyc. p. 1152.

It follows that the complainant has not title by adverse possession, but had only a permissive occupancy which ceased when the public demanded the use of the entire alley.

It appears from the record that complainant built a

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fence which is, according to his evidence, south of the south boundary line of the alley, as platted, and on his own ground. He testified that this fence was not constructed with any reference to the boundary line, but for the purpose of keeping people out of his yard, particularly boys who were accustomed to go to a pile of gravel, pick up stones, and throw them at the windows of his buildings. The city contends that this fence should constitute the boundary line. Probably this fence, like the piles of lumber, was not located with any reference to the boundary line. Complainant has obtained no rights upon the city's highway. Neither has the city obtained any rights to complainant's land by reason of the fence. The boundary line as established by the plat is the boundary line between the alley and complainant's lots, 184 and 185.

The decree will be reversed, with costs of this court, and entered in accordance with this opinion.

BLAIR, C. J., and MOORE, MCALVAY, and BROOKE, JJ., concurred.

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MENTER v. FIRST BAPTIST CHURCH OF EATON RAPIDS.

1. EASEMENTS— ADVERSE POSSESSION— PERMISSIVE USER— COLOR OF TITLE.
   An infrequent user for occasional convenience of adjoining premises by one having ample means of access to his own premises is a permissive user.
2. SAME—NOTICE.
   An easement by prescription depends on a user under such circumstances that the owner of the servient estate acquired actual notice of the adverse claim.
3. SAME—PRESCRIPTIVE RIGHT OF WAY—EVIDENCE.
   The character of such use or occupancy under an adverse and hostile claim of right may be evidence of actual notice, but it must be so open, notorious and hostile as to leave no doubt in the mind of the owner that his rights are invaded.
4. SAME—PERMISSIVE USER.
   A permissive user can never ripen into title by prescription.
5. SAME—EVIDENCE OF PERMISSION—ENCLOSURE.
   Passing over uncultivated land which is not inclosed by fences is not inconsistent with the use which the owners make of the land.
6. SAME— CHURCHES AND CEMETERIES— GATES— FENCES— PUBLIC GROUNDS.
   An adjoining proprietor cannot obtain title to a right of way over the grounds of a church, schoolhouse or other *quasi* public institution by occasionally passing through the gates over the inclosed lands to his own premises.

Appeal from Eaton; Smith, J. Submitted October 12, 1909. (Docket No. 57.) Decided December 10, 1909.

Bill by Melissa C. Menter against the First Baptist Church of Eaton Rapids to establish an easement by prescription. From a decree dismissing the bill, complainant appeals. Affirmed.

Horace S. Maynard (*John M. C. Smith*, of counsel), for complainant.

Elmer N. Peters (*Joseph B. Hendee*, of counsel), for defendant.

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The object of the bill of complaint in this case is to establish an easement, a private right of way, over the land of the defendant to the adjoining land of the complainant. The case was heard upon pleadings and proofs taken in open court. The judge viewed the premises and dismissed the bill.

Complainant owns lot 4 of the village of Eaton Rapids, extending from Dexter Road upon the south to Division street upon the north. West of her lot is located the church property of the defendant. Her house fronts on Dexter Road. Between the west side of her house and the adjoining lot upon the west is a passageway 9 feet wide in front and 10 feet in the rear. There is also a narrow passageway between the west line of her house and the east line of defendant's land. Three outbuildings were located on the north of her lot, on Division street. The building on the northeast corner was a carriage house, with doors in front and rear sufficiently wide for teams to drive through to the central part of her lot. The next building to it was an icehouse. On the northwest corner of her lot was a barn. The width of the space between the icehouse and the barn is not stated in the record. Ten years before the case was heard, the carriage house and icehouse had been removed. There was a fence, composed partly of boards and partly of pickets, on the west side of complainant's lot. She claims that there was a gateway located about the middle of the fence when she purchased the land in 1883, and that she had obtained a prescriptive right of way over defendant's land through said gateway. The principal, if not the sole, use she made of this alleged right of way was in having wood, coal, and occasionally provisions drawn over defendant's land through this gateway to the rear of her house. She used about four tons of coal a year, and what wood was necessary to supply her household fires.

One Dr. Wilkins was her grantor, and had occupied the premises for a number of years. In none of the mesne conveyances, from the original owner to her, was any

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reference made to such right of way. The defendant gave evidence tending to show: That originally the church property was inclosed by fences; that upon the north there was a row of horse sheds, extending from the barn on complainant's lot to the west along Division street; that upon the Dexter Road were two large gates for the passage of teams, one upon the east and the other upon the west sides of the church; that there was a row of hitching posts on the east side near complainant's lot line, extending from a point near the Dexter Road to the sheds upon the north, these posts being connected by rails with narrow spaces left at convenient distances for parties hitching to pass in front of their teams. One Brown built these sheds, which had eight stalls, and kept for his own use the one next to complainant's barn, which was on the boundary line. For his own convenience, he put doors in his stall at the end of the shed so that he might open them and drive through onto Division street, as it was at times difficult to back out of the shed. Mr. Brown used this shed from 1875 to 1882. Parties would sometimes open these doors and drive through. Seventeen or eighteen years before the hearing, these sheds were removed to the west side of the church, the hitching posts on the west side were taken away, and the ground graded and seeded up to complainant's lot line. Complainant testified that, after the shed was taken away:

"We drove anywheres, the same as the rest of them. The Baptists had their track that we followed."

She also testified:

"I don't think there is any mark of travel between my property and the church, or that there is any track noticeable on my property. I don't drive in often enough. I did not drive in enough to have a beaten road at all."

Complainant sought to show that her grantor, Dr. Wilkins, made use of this alleged right of way under a claim of right. The evidence very clearly establishes the fact that Dr. Wilkins drove in and out over his own land on the

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east of his house, where there was a gate constructed for the passage of teams and vehicles, and through his carriage house or shed upon the north. His supplies of wood, coal, and provisions were drawn to the rear of the house through these two ways. There is also evidence that he protested to parties from whom he had bought wood against their driving over the church lot alongside his fence, and throwing the wood over the fence. The preponderance of evidence is against complainant in the use of this alleged way by Dr. Wilkins, and it is clear that she did not purchase her land with any view to an existing easement over defendant's land.

GRANT, J. (*after stating the facts*). The judge filed a written opinion holding that whatever use was made of defendant's land by Dr. Wilkins or complainant was a permissive one. He also found that "there is not the least proof that it was founded, or ever has been, on any claim of right to so use it." Passing over this land to complainant's lot was very infrequent, and was not by her, but by those from whom she occasionally bought merchandise for her own use. Such driving over the carriageway made and used by defendant did not tend to show an exclusive claim or right in her. The most that can be claimed is that defendant permitted complainant and others to drive through its property for their convenience. Complainant had ample means of access to her house over her own lands. One having ample means of access to his own premises, over his own land, cannot acquire a prescriptive right of way over adjoining lands without asserting his right thereto in some way more hostile and notorious than its occasional use for his own convenience. The law under which such an easement is obtained is not in doubt. It has been stated in a multitude of cases. The question which the courts have had to decide is whether the facts in the particular case are sufficient to establish the easement. We said in *Ann Arbor Fruit & Vinegar Co.* v. *Railroad Co.*, 136 Mich. 599, 608 (99 N. W. 869, 872, 66 L. R. A. 431):

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"We concede that evidence of a notoriously hostile claim and hostile possession is admissible to prove, and that such evidence may in some cases justify the finding of, a prescriptive right. But this finding rests, in our judgment, upon the assumption that the owner of the servient tenement acquired actual notice of the adverse holding."

See, also, *Andries* v. *Railway Co.*, 105 Mich 557 (63 N. W. 526); *Dummer* v. *Gypsum Co.*, 153 Mich. 622 (117 N. W. 317); *Burnham* v. *McQuesten*, 48 N. H. 446; *Chicago, etc., R. Co.* v. *Johnson*, 205 Ill. 598 (68 N. E. 1112). Such actual notice may be determined by the character of the use and occupancy. Such use and occupancy, however, must be so open, notorious, and hostile as to leave no doubt in the mind of the owner of the land that his rights are invaded in a hostile manner. Permissive use can never ripen into title by prescription. 22 Am. & Eng. Enc. Law (2d Ed.), p. 1202.

The defendant's church buildings and grounds were occupied upon Sundays, and were generally unoccupied on week days. They were originally surrounded by fences with gates, and also with an entrance through the shed above mentioned. Whether these fences were retained, when the church was remodeled and the grounds graded and seeded, the record does not show. The church authorities had no notice, or reason to believe, that complainant claimed a prescriptive right of way over its property until shortly before this suit was commenced. Such passing over it was not an assertion of a hostile claim, or frequent enough to become notorious. The parties delivering goods to her entered at the same place the worshipers and attendants upon the church entered, and what little passing was done into her lot made no perceptible impression upon the ground. If there were no fences, complainant could not acquire a right of way, granting all the evidence given in her behalf to be true. *Kilburn* v. *Adams*, 7 Metc. (Mass.) 33 (39 Am. Dec. 754). Chief Justice Shaw said in that case:

"Such a use [passing over the land by an adjoining

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proprietor] is not inconsistent with the only use which the proprietors think fit to make of it; and therefore, until they think proper to inclose it, such use is not adverse, and will not preclude them from inclosing it, when other views of the interests of the proprietors render it proper to do so."

If the proprietors of churches, schoolhouses, and other *quasi* public buildings inclose their grounds and provide unlocked gates for passage, an adjoining proprietor cannot obtain title to a right of way by occasionally passing through the gates and over the inclosed land to his own premises. The same rule applies to grounds thus inclosed as applies to those uninclosed.

On many of the material facts in this case there was a sharp conflict of evidence. The circuit judge saw the witnesses, and they were many. He viewed the premises, and, we think, arrived at the correct conclusion.

The decree is affirmed, with costs.

BLAIR, C. J., and MOORE, MCALVAY, and BROOKE, JJ., concurred.

ANDREWS *v.* LAVERY.

1. APPEAL AND ERROR—CONTENTS OF RECORD—NARRATIVE FORM REQUIRED.

   A chancery record which consists of a copy of the stenographer's minutes of testimony, including the colloquies of counsel and question and answer, is not in accordance with 3 Comp. Laws, § 10188, requiring that the record be settled as in actions at law.

2. INCOMPETENCY—EVIDENCE.

   A man of 58 years of age who, although affected by Bright's

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disease, is able to comprehend the purpose of a transfer of insurance from his wife to his daughter, and whose intention appears rational, is properly held to have been competent to execute the transfer.

3. UNDUE INFLUENCE—EVIDENCE—INFERENCES.
Undue influence is largely a matter of inference from facts and circumstances, including the character, disposition and mental condition of the person influenced, and the opportunity to influence him.

4. SAME.
A finding of undue influence is sufficiently supported by testimony that the grantor left his wife, who was insane and had only a small amount of property, without any of his estate for her support, and transferred it all to his daughter who was married and sufficiently provided for, that he was enfeebled by disease, was away from the wife and within the influence of his daughter, that no ill feeling towards his wife existed, and no other means of influencing him to make the transfer of insurance to the daughter were disclosed.

5. CONTRACTS — SPECIFIC ENFORCEMENT — PAROL ANTENUPTIAL AGREEMENT—FIDUCIARY RELATION.
A parol antenuptial agreement, valid because executed on the one side and because of execution tendered on the other, providing for a transfer of insurance to the wife in consideration of a devise of realty may not be annulled by one of the parties who was, at the time of the attempted annulment, the husband and guardian of the other, the alleged reason for the rescission being that the wife was incompetent to execute her part of the agreement.

Appeal from Bay; Collins, J. Submitted October 12, 1909. (Docket No. 52.) Decided December 10, 1909.

Bill by Martin M. Andrews, guardian of the estate of Agnes C. Cole, against Mabel Lavery and Arthur Lavery to set aside a change of beneficiary in a policy of insurance. From a decree for complainant, defendant Mabel Lavery appeals. Affirmed.

Stoddard & McMillan, for complainant.

T. F. Shepard, for appellant.

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Agnes C. Cole, the ward of complainant, is the widow of Fred B. Cole, deceased, and defendant Mabel Lavery is his only child by a former marriage. These two are the sole heirs at law of the deceased. Mr. Cole married his second wife in August, 1905. In 1906 she became affected with some mental disorder. For a short time she was in the local hospital at Bay City. She was then taken to a private asylum at Flint. On December 28, 1906, Mr. Cole filed a petition in the probate court, praying that his wife be declared insane, and admitted to the Eastern Michigan Asylum for the Insane at Pontiac, there to be supported at the expense of the county. Hearing was fixed for December 31st, and on that day, upon the certificate of two physicians, she was adjudged insane and a fit person for care and treatment in said asylum, and it was ordered that she should be admitted as a private patient. By said order Mr. Cole and the defendant Mabel were authorized to remove Mrs. Cole to said asylum; and on January 30, 1907, they removed her to that institution. Meanwhile she had remained in the private asylum at Flint.

On December 29, 1906, Mr. Cole filed a petition in the probate court, alleging that his wife, Agnes C. Cole, had personal estate of the estimated value of $2,500; that, by reason of her insanity, she was incompetent to have the care and management of her estate, and praying that he be appointed as her general guardian. On January 8, 1907, he filed another petition, alleging that she had personal estate of the estimated value of $1,350, and prayed to be appointed special guardian; that she was then undergoing treatment at the Oak Grove Sanitarium at Flint; and that it was necessary to use a portion of her estate immediately for said treatment and other expenses. He was appointed special guardian with a bond of $2,000, which he furnished. On February 5, 1907, Mr. Cole was appointed general guardian of his wife, and qualified by filing the required bond in the sum of $2,000. On February 12th he filed with the probate court his account as

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special guardian, amounting to $361.57. This account included expenses for her treatment in the private hospital at Flint, for her removal to Pontiac, physician's bills, and attorney's fees.

Mr. Cole died March 11, 1907. On April 29, 1907, defendant Mabel was appointed administratrix of her father's estate. After Mr. Cole's death, complainant Andrews was appointed guardian of Mrs. Cole. On May 10, 1907, he filed a petition for the removal of Mrs. Lavery as administratrix. On May 31, 1907, she was removed, and one Charles C. Cottrell was appointed administrator in her stead. On September 3, 1907, defendant Arthur M. Lavery, the husband of Mabel, filed a claim against Mr. Cole's estate for nursing and care of person and property of Fred B. Cole from November 2, 1906, to March 11, 1907, $387, and expenses from Tonawanda, N. Y., to Bay City, Mich., $8.50.

Mr. Cole at the time of his second marriage had three policies of life insurance, two of which were in the Bankers' Life Association of Iowa, each for $2,000, payable to his daughter as beneficiary. The controversy here arises over one of these policies. On the 22d day of September, 1905, he assigned one of the policies, No. 69,356, to his wife, now complainant's ward. The insurance company consented to this change of beneficiaries. On the day after his return from taking his wife to the Pontiac Asylum, viz., February 1st, he revoked this assignment and designated the defendant Mabel as his beneficiary instead of his wife to the amount of $1,800, and the balance, $200, to Ella Cole, his niece. This designation was also consented to by the insurance company.

The object of the bill of complaint in this cause is to set aside the transfer of this policy to his daughter, and to direct the payment thereof to the complainant for the benefit of his ward.

The grounds for the relief asked are:

(1) That said deceased was at the time incompetent to make such transfer.

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(2) That it was obtained by undue influence on the part of his daughter.

(3) That it was in fraud of the rights of his wife.

Upon the hearing it was established by the evidence on the part of defendants that Mrs. Cole made a parol antenuptial agreement by which she was to be made the beneficiary in this policy of insurance, and Mrs. Cole was to make a will devising what property she had to her husband. He executed the transfer of the policy, but she had not made the will. She had never refused to make it, but deferred it, saying that he would have all her property at her death; that before she was taken to the hospital in Bay City she offered to carry out her agreement, but he refused on account of her mental condition. Three or four days before Mr. Cole died he executed papers transferring all his property to the defendant Mabel, including cash $500. Mr. Cole was affected with Bright's disease and heart disease for some time before he died. He was at times very much depressed in mind, and became despondent over his financial troubles and health; and at times his conduct was not normal, and was such as might lead to the inference that at periods he was not competent to attend to business affairs.

The bill also sought to set aside the other transfers of property, as above stated. That issue was evidently decided by the court below against complainant, as the transfers then made are not mentioned in the decree. The decree set aside the transfer of the policy of insurance as to the $1,800 provided therein to be paid to defendant Mabel, and authorized the complainant to receive and collect the same. The defendants alone have appealed.

GRANT, J. (*after stating the facts*). 1. The record in this case was made by a copy of the stenographer's minutes of the testimony taken in open court, including all the colloquies between counsel and the court, and attaching to it the certificate of the judge. Such testimony makes a record of more than 200 pages. The issues in-

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volved require an examination of all the testimony. A record thus made up for a chancery appeal to this court is very easy for counsel and the trial court, but it imposes a needless amount of labor upon the appellate court. The statute (3 Comp. Laws, § 10188) provides for settling a case—

"Setting forth in substance all the evidence taken or read at the hearing, following as far as practicable the making of cases for review at law before the judge who tried the same, at such time and in such manner as is now provided by rule for the settlement of bills of exceptions in cases at law."

Following this statute, this record could easily have been condensed into one-third its present size with a saving of labor to the appellate court and expense to litigants. This practice in making up records is to be condemned. There is no occasion for making up a record of questions and answers except where, in the opinion of the trial court, it is essential for a proper understanding of the evidence, and to show the manner of eliciting the testimony.

2. As above stated, we assume that the trial court held that the complainant had failed to establish a case of incompetency in Mr. Cole to execute the transfer of the policy. He took the policy of insurance to his attorney, Mr. Shepard, who is the solicitor for the defendants in this case and their witness also, and told him what he wanted to do. According to this witness, he desired to make the change because he did not want the money to "go into the control of the Kelleys and her." The witness testified that Mr. Cole further said that, "He didn't want them (the Kelleys) to have any of it, neither did his wife." He seemed to understand and fully comprehend what he was doing. Without extending the evidence, we are constrained to hold that Mr. Cole was not at that time incompetent to execute the paper.

3. The question of undue influence rests upon a different basis. We said in *Rivard* v. *Rivard*, 109 Mich. 98 (66 N. W. 681, 63 Am. St. Rep. 566):

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"Undue influence is not exercised openly. Like crime, it seeks secrecy in which to accomplish its poisonous work. It is largely a matter of inference from facts and circumstances surrounding the testator, his character and mental condition as shown by the evidence, and the opportunity possessed by the beneficiary for the exercise of such control."

Tested by this rule, it is quite apparent that some influence must have induced Mr. Cole not to leave his wife, who was then confined in an insane asylum, a dollar of his property for her support. His only child was married, and, so far as this record shows, to one who was able, and whose duty it was, to support her and who was supporting her. Mr. Cole was under no legal obligation to her. He was under both a legal and moral obligation to provide for his wife. He, however, attempted, not only to deprive her of any interest in his property, but also to impose upon her small estate the cost of her support in the hospitals and asylums, an expense which the law imposed upon him. Such conduct is unnatural. Mr. Cole, then about 58 years of age, was enfeebled by long continued and severe disease. His legs were swollen by the malady from which he was suffering. He was away from the influence of his wife. His constant companions were his daughter and her husband. He died a little over a month after the change in the policy was made. The relations between him and his wife had always been pleasant. There is no evidence of any unkind words or ill feeling between them. Under these circumstances, clearly some improper influence must have operated on him. No other influence can be suggested than that of his daughter or her husband, or both, who had the opportunity to influence him to take the action he did. If such a case were submitted to a jury, and they should find a verdict of undue influence, the courts would not set it aside. Whether the circuit judge so found or not we do not know. We think the circumstances are sufficient to justify a finding of undue influence, and we so hold.

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4. The antenuptial agreement, though resting in parol, was valid, having been executed by Mr. Cole, and his wife having tendered him the execution upon her part. *Phillips* v. *Phillips*, 83 Mich. 259 (47 N. W. 110). In that case the agreement rested in parol, the husband agreeing to convey to his wife by deed a piece of land, she agreeing to give him back a life lease. He executed the deed to her. She, contrary to the case now before us, refused to execute the contract. He then filed a bill to set aside the deed. The court affirmed the transaction, refused to set aside the deed, and compelled her to execute the life lease. See, also, *Manke* v. *Manke*, 75 Mich. 435 (42 N. W. 958); *Houghton* v. *Houghton*, 14 Ind. 505 (77 Am. Dec. 69). The excuse given by him that he declined to accept the will because of her supposed mental condition, and because he did not want the property to go to her relatives, is not valid. When he made the contract, he knew that, if executed, the policy passed irrevocably to her, and that, if she performed her part by executing the will, his death before hers would cause a lapse of the legacy. Rood on Wills, § 668. She had never refused to execute a will, had always expressed a willingness to do so, but had delayed doing it. When she offered to execute it, she had not been found to be insane by anyone, and had not even been sent to the hospital in Bay City for treatment. There is no evidence of her incompetency to make a will. On the contrary, there was probative evidence that she was competent. Mr. Lavery testified:

"*Q.* When did you first notice anything peculiar on her part that looked as though she were crazy?

"*A.* That was a short few days possibly before the doctors examined her."

Not only by virtue of her marriage, but by virtue of his guardianship, Mr. Cole occupied the position of a most sacred trust towards his wife. It did not lie in his mouth

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or power to annul a contract executed by him, and ready to be executed by her, by which he had agreed to transfer to her the policy in question.

The decree is affirmed, with costs.

BLAIR, C. J., and MOORE, MCALVAY, and BROOKE, JJ., concurred.

KIMMERLE *v.* DOWAGIAC GAS CO.

1. ACCOUNTING—DEBTOR AND CREDITOR—ASSUMPTION OF LIABILITIES—CORPORATIONS.

   It is sufficient in a bill for an accounting, filed by the trustee in bankruptcy of a promoter, that the averments show the promoter was a contract creditor of the defendant corporation, by virtue of an assumption by it of the contract debt of one of its stockholders owing to the promoter.

2. SAME—INSOLVENCY—SUFFICIENCY OF PLEADING.

   A bill of complaint sufficiently alleges insolvency which shows that the defendant corporation owes more than it can pay, that suits have been brought against it and judgments rendered which the company cannot pay.

3. SAME—ACTIONS—INSOLVENCY.

   Insolvency is not a necessary averment of a bill of complaint against a corporation which avers that the complainant's assignor was the defendant's promoter, that it assumed an obligation due to him from its principal stockholder and arising out of his efforts as promoter, and that an accounting is necessary to determine the amount due.

4. CORPORATIONS—STOCKHOLDERS AND CREDITORS—SUITS.

   In so far as it is necessary for such bill of complaint to aver an attempt to procure a settlement from the company, it is sufficient in showing that the corporation was substantially owned by one man, that he had authority to act for the com-

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pany and refused to pay the indebtedness to the complainant, and that the latter was denied an examination of defendant's books which had been removed from the State.

5. EQUITY—ADEQUATE REMEDY AT LAW—ACCOUNTING.
The bill of complaint is sufficient as against an objection that the remedy at law is adequate if it sets forth facts which render relief in an action at law difficult and inadequate because of the intricacy of contracts involved in the proceeding and the character of acts done in carrying out their provisions.

6. SAME—MULTIFARIOUS BILL OF COMPLAINT—PLEADING.
It is proper to join as parties defendant in an action for accounting under such contracts, the original debtor, the new corporation which assumed the obligation and a bank which acted as trustee of the assets which were to be transferred to the new corporation, in carrying out the promotion scheme.

Appeal from Cass; Des Voignes, J. Submitted October 12, 1909. (Docket No. 27.) Decided December 10, 1909.

Bill by Charles H. Kimmerle, trustee in bankruptcy of Frank W. Lyle and others, against the Dowagiac Gas Company and others for an accounting. From an order overruling a demurrer to the bill, defendant gas company appeals. Affirmed.

McKnight & McAllister (*Charles E. Sweet*, of counsel), for complainant.

Coy W. Hendryx (*M. L. Howell*, of counsel), for defendants.

Complainant is the trustee in bankruptcy of Frank W. Lyle, Ira B. Gage, and Leon R. Lyle, copartners under the firm name of Lyle, Gage & Co., and the said parties as individual bankrupts. The defendants are Russell B. Harrison, the Dowagiac Gas Company, and the City National Bank of Kalamazoo. The object of the bill is to reach assets alleged to belong to the estate of said bankrupts, and money and property claimed to be in the pos-

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session of the Dowagiac Gas Company and the City National Bank; and for an accounting between the complainant, as assignee of said bankrupts, and defendants Harrison and the Dowagiac Gas Company; and for a lien upon the property of the Dowagiac Gas Company for the amount found to be due. The bank is made a party as the depository or holder of certain bonds, stocks, and notes, specified in the bill of complaint, under certain contracts entered into between Frank W. Lyle, acting for the Dowagiac Gas & Fuel Company, and Harrison, acting for the Dowagiac Gas Company. The bill of complaint and the four contracts, attached to and made a part of it, cover 61 pages of the record. A full statement of the allegations of the bill and the terms of the contracts is not now necessary to a determination of the questions raised.

The bill avers: That the Dowagiac Gas & Fuel Company is a corporation with a capital stock of $90,000, and a mortgage bond issue of $75,000, and was carrying on and conducting a gas and fuel business in the city of Dowagiac; that said Frank W. Lyle was the owner of $85,000 of the capital stock of said company, and the owner of $29,000 of the bonds; that, aside from this amount, only $9,000 of the bonds had been actually sold, and the balance had been deposited as collateral security for loans made by the company; that said Lyle was practically the owner of all the stock and bonds of the company; that he entered into a contract with the defendant Harrison by which he agreed to sell to said Harrison all the property and franchises of the said gas and fuel company; that said Harrison agreed to organize a new corporation, under the name of the Dowagiac Gas Company, with a capital stock of $100,000, and an authorized bond issue of $150,000. Said Lyle agreed to procure from the stockholders of the gas and fuel company a transfer of its property, by proper resolution, free and clear of all debts and claims.

It was agreed that the City National Bank should act

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as depository agent under the terms of said contract, "and pending the completion, execution, and delivery of the bonds and stock of the Dowagiac Gas Company (in payment of said property, etc., of the gas and fuel company), said depository shall have the right to issue interim bonds and stock certificates representing the bonds and stocks of the Dowagiac Gas Company, which company is to be immediately incorporated." The contract is lengthy, and contains many provisions and conditions to be performed by each party; but we deem it unnecessary to further set them forth. They are intricate, and a careful examination is required to understand and determine the rights of the parties thereunder. Subsequently three other contracts were made and entered into between Lyle and Harrison, modifying the terms of the first contract.

On January 27, 1908, 19 days before Lyle and his copartners filed their petition in the United States court as voluntary bankrupts, the fourth contract was executed by Lyle and Harrison, extending the times of payment by Harrison. The bill alleges that at that time Frank W. Lyle was hopelessly insolvent, and one of the purposes of the bill is to declare that contract void. The bill also alleges: That Mr. Lyle performed his part of the contract and procured the transfer of the property and franchises of the gas and fuel company; that Harrison procured the organization of the defendant the Dowagiac Gas Company; that the Dowagiac Gas Company took over to itself the contract between Harrison and Lyle; and that, in fact, Harrison was a promoter acting for the company to be organized, of which he is the chief stockholder, and over which he has control. The bill also alleges that an accounting is necessary in order to ascertain the amount due from the Dowagiac Gas Company to the complainant as the assignee in bankruptcy of Mr. Lyle. The bill further alleges: That complainant interviewed said Harrison with a view to an adjustment and settlement of the matters and differences between the parties. That he subsequently wrote a letter to said Harrison, who resided in

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the city of Indianapolis, Ind., requesting him to come to the city of Dowagiac with a view to settle the matters in dispute. He received in reply a letter repudiating his obligations, and stating that he had employed an attorney of Chicago to represent him, and another of Dowagiac to represent the Dowagiac Gas Company. That he thereafter applied to the Dowagiac Gas Company for leave to examine the books and records of said company, and was informed that all the books and records of both companies had been removed from the State of Michigan. The contract between the parties also provides for an accounting.

The bill prays:

(*a*) For an accounting.

(*b*) That the Dowagiac Gas Company be decreed to have ratified and adopted all the acts of said Harrison in the premises.

(*c*) That the performance of all of the terms and conditions of said contracts be decreed to have been the consideration for the transfer of the property to the Dowagiac Gas Company.

(*d*) That the amount due and owing under the said contract be found and fixed on said accounting, and that the complainant be decreed to be entitled to the payment thereof.

(*e*) That said Dowagiac Gas Company be decreed to deliver to complainant a note for the sum of $10,000 secured by the bonds of the Dowagiac Gas Company, as provided in said contracts.

(*f*) That complainant be decreed to have a vendor's lien upon the property of the said Dowagiac Gas Company.

(*g*) That the defendants be required to return all the records, papers, and books of the Dowagiac Gas Company and the Dowagiac Gas & Fuel Company which it has removed from the State of Michigan, and produce the same for the inspection and examination of complainant.

(*h*) That a receiver be appointed.

To this bill of complaint the defendant interposed a demurrer for the following reasons:

(1) The bill does not show any contract relation between the complainant and the defendant the Dowagiac

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Gas Company, or between said Lyle and said company.

(2) The bill does not show that defendant is indebted to complainant.

(3) It does not show that complainant is a creditor or representative or assignee of any creditor of the defendant.

(4) That the bill does not set forth any facts upon which to base a claim that the defendant Dowagiac Gas Company is insolvent.

(5) That complainant made no effort through defendant's proper officers to obtain relief.

(6) That complainant has an adequate remedy at law.

(7) The bill shows no necessity for an accounting or discovery.

(8) The bill states no grounds for equitable relief.

(9) That the bill is multifarious.

The court below overruled the demurrer.

GRANT, J. (*after stating the facts*). 1. The first three grounds of the demurrer may be considered together. They are, in substance, that complainant has shown no legal interest in the transactions between Frank W. Lyle and the Dowagiac Gas & Fuel Company, on the one side, and the defendants Harrison and the Dowagiac Gas Company, on the other. Complainant, as the assignee in bankruptcy of Mr. Lyle, succeeded to all his property and interests. If Mr. Lyle had any claim against the defendants, that claim passed, by the assignment, to complainant. If Mr. Lyle was a creditor, his assignee is also a creditor. All the contract relations between Mr. Lyle and the defendants passed by the assignment to the complainant. The same is true of the bankrupt copartnership which did a banking business. The bill avers that the defendant Dowagiac Gas Company assumed and agreed to pay to the bankrupt copartnership a note of $14,920, that the defendant Harrison was indebted to Mr. Frank W. Lyle in the sum of $48,000 on his contract with Lyle, and that said contract was assumed by the defendant Dowagiac Gas Company. If the allegations of the bill are true, then this contract was

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taken over by the defendant company, and it is liable thereunder. *Esper* v. *Miller*, 131 Mich. 334 (91 N. W. 613).

2. If it were necessary to allege the insolvency of the defendant company, we think the allegations are sufficient, even if it were necessary to allege the facts upon which such insolvency is based. The bill (paragraph 35*a*) expressly alleges the insolvency, a statement made by Harrison that it owes more than it can pay, and that suits have been brought against it in which judgments have been rendered, or are about to be rendered, which the company is unable to pay; but we fail to understand wherein the solvency or insolvency of the defendant company is material. The rights of the complainant do not in any wise depend upon the solvency or insolvency of the company. That question affects, not the remedy, but the amount complainant can realize if he succeeds in maintaining his suit upon the hearing.

3. The bill alleges an effort made to settle matters through Mr. Harrison, who it is alleged is substantially the owner of the corporate property. The bill avers his own admission that he had authority to act for the company, for, in his letter, he informed complainant that he had employed two attorneys, one to represent him, and the other to represent the company, that complainant then applied to the office of the company at Dowagiac, was denied an examination of defendant's books and records, and was informed that they had been removed from the State. These attempts at a settlement were sufficient, even if it were necessary to allege and prove them.

4. The bill states a case peculiarly appropriate for the interposition of a court of equity. It is not enough that complainant might have brought a suit at law. It is sufficient to show that his remedy at law would not be adequate. *Blodgett* v. *Foster*, 114 Mich. 688 (72 N. W. 1000, 68 Am. St. Rep. 504), wherein it was held that a suit in equity for an accounting would lie though all the accounts were on one side, but there were circumstances of

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great complication or difficulty in the way of adequate relief at law.

It was said in *Williams* v. *Neely*, 134 Fed. 1 (67 C. C. A. 171, 69 L. R. A. 232):

"The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity"—citing authorities.

The reading of the long and intricate contracts in this case, and the averments as to what was done under them, would convince even a layman that a suit at law with a jury would be inadequate.

5. The seventh and eighth grounds of the demurrer are disposed of by what has already been said.

6. The bill is not multifarious. All the defendants are shown by the averments of the bill to be connected with the contracts set up in the bill of complaint. The bank is made trustee, and is alleged to have some of the assets in its possession. It requires no argument to show that the relation between Harrison and the defendant company is such as to make them not only appropriate, but necessary, parties to the bill.

The decree is affirmed, with costs, and the case remanded to the court below for further proceedings in accordance with the rules and practice of the court.

BLAIR, C. J., and MOORE, MCALVAY, and BROOKE, JJ., concurred.

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CARNELL *v.* HALPIN.

1. MASTER AND SERVANT — NEGLIGENCE — SCAFFOLDING — SAFE PLACE.

   The failure of an employer to furnish sound lumber for a scaffold for an employé engaged in the work of putting up storm windows, and not familiar with the requirements of scaffolding, is evidence of negligence.

2. EVIDENCE — LAWS OF FOREIGN COUNTRIES — PRESUMPTIONS — JUDICIAL NOTICE.

   An action of tort arising in a foreign jurisdiction is not barred on the ground that no recovery could be had in such jurisdiction without evidence of the foreign law.

Error to Wayne; Donovan, J. Submitted October 13, 1909. (Docket No. 78.) Decided December 10, 1909.

Case by Frank B. Carnell against Joseph J. Halpin for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

Charles T. Wilkins, for appellant.

Frank C. Cook, for appellee.

MOORE, J. This case was begun to recover damages for personal injuries sustained by the plaintiff December 16, 1904, by a fall caused by the breaking of part of a scaffold on which he was working for the defendant in the construction of storm windows in a church at Sandwich, Ontario. The plaintiff and the defendant are both residents of Detroit, where the latter is engaged in the manufacture of stained and other glass windows, and in setting them. The trial judge directed a verdict in favor of defendant. The case is brought here by writ of error.

The plaintiff is a lead glazier, and had been engaged in that trade for about a year previous to the time of entering

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defendant's employ, in July, 1904. It is his claim: That before that time he had no experience in any work outside shopwork, and his work in the defendant's employ was benchwork in the defendant's factory, putting together glass that had been cut to pattern, in stained, pattern, and figured windows. That after that date, until the injuries occurred, he had been engaged on only two jobs outside defendant's factory, both of which were on church windows; on one of which his work was entirely inside the church and was done from planks laid across painters' horses, and the outside work on the other of which was done from ladders; plaintiff holding the base of the ladder while another man worked on it. It was his further claim that he had never had any experience on a scaffold, or in building a scaffold, or with lumber or in carpentering.

The defendant had a contract to put up some 22 large storm windows, and sent the plaintiff there with James Bracken, foreman in his business, who was in charge of the work. Later on Walters and one Bealer were sent over to help with the work. The work was going on for several days, when it was decided to put up a scaffold. It was the testimony of defendant that he and Mr. Bracken called at a lumber yard in Windsor, and the proprietor was told of the job at Sandwich, and "that Bracken was going to look after it for me and to give him at the proper time whatever lumber he would require and charge it to me." It is not admitted by plaintiff that any such conversation occurred, and complaint is made that the cross-examination of Mr. Halpin was cut short with an intimation from the trial judge that he was ready to instruct the jury about the material.

It is the claim of the plaintiff that, instead of new and suitable material being supplied, the planks which were used on the platform were taken from a pile of old planks that had previously been used for sidewalks, and that they were not suitable material for the construction of a platform. It was shown by the cross-examination of plaintiff that he assisted in bringing the planks from the

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pile to where they were used; but, as before stated, he claims to have had no experience as to lumber or its suitableness for a platform, and that he was simply carrying out the orders of the foreman. The trial judge, among other things, said to the jury:

"The employer in this case provided material as I deem it, and an experienced foreman, a man of bright intelligence, and they were all very intelligent, all understood the English language. A lumber firm was instructed to supply the material, all that was needed, and the employer thereby did his whole duty."

As before stated, a verdict was directed in favor of defendant. In doing this we think the judge erred. The case was one to be submitted to the jury under proper instructions. See 2 Labatt on Master & Servant, p. 1654; *Lafayette Bridge Co.* v. *Olsen*, 108 Fed. 335 (47 C. C. A. 367, 54 L. R. A. 33); *Richards* v. *Hayes*, 17 App. Div. 422 (45 N. Y. Supp. 234); *Brown* v. *Gilchrist*, 80 Mich. 56 (45 N. W. 82, 20 Am. St. Rep. 496); *Morton* v. *Railroad Co.*, 81 Mich. 423 (46 N. W. 111); *Tangney* v. *Wilson & Co.*, 87 Mich. 453 (49 N. W. 666); *McIntyre* v. *Detroit Safe Co.*, 129 Mich. 385 (89 N. W. 39); *McDonald* v. *Railroad Co.*, 132 Mich. 372 (93 N. W. 1041, 102 Am. St. Rep. 426).

It is suggested that the directed verdict should stand, though it should be found that the reason given by the judge for directing the verdict was not a good one, as under the law of Canada the plaintiff cannot recover. An answer to this suggestion is found in the fact that no proof was made in the lower court as to the law of Canada applicable to the case. See *Jones* v. *Palmer*, 1 Doug. (Mich.) 379; *Crane* v. *Hardy*, 1 Mich. 56.

Judgment is reversed, and new trial ordered.

BLAIR, C. J., and GRANT, MCALVAY, and BROOKE, JJ., concurred.

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BELLOWS FALLS MACHINE CO. *v.* MUNISING PAPER CO.

SALES—WARRANTIES—MACHINERY—FITNESS FOR PURPOSE.

Machines furnished under a contract which specified that the design, material, and labor should be the best of the several kinds for their respective uses, and that the workmanship and material should be strictly first class for the purpose and in the place where used, and that the final payment was to be made thirty days after successful operation, are required to operate successfully for defendant's purpose known to the seller, before payment can be compelled in an action of assumpsit.

Error to Alger; Steere, J. Submitted October 13, 1909. (Docket No. 65.) Decided December 10, 1909.

Assumpsit by the Bellows Falls Machine Company against the Munising Paper Company, Limited, for goods sold and delivered. A judgment for defendant is reviewed by plaintiff on writ of error. Affirmed.

Charles E. Ward, for appellant.

William P. Belden and *Fred H. Berg*, for appellee.

MOORE, J. The plaintiff makes, at Bellows Falls, Vt., paper mill machinery. In June, 1904, and prior thereto, the defendant was building a large paper mill at Munising, Mich. It desired a double drum slitting and winding machine. The plaintiff had a voluminous correspondence with defendant, which resulted in the making of a written contract in June, 1904. The machines were furnished and put in place. They were partially paid for. The defendant claimed they did not meet the contract requirements, and could not successfully be operated, and declined to make the final payment for them. The plaintiff brought this suit to recover for the final payment. The defendant pleaded the general issue, and gave notice

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of recoupment. The claims of the respective parties will appear more in detail later on. The jury returned a verdict in favor of defendant. The case is brought here by writ of error.

Those portions of the contract which are material here are as follows:

"The party of the first part hereby agrees to furnish all labor and material required for the complete delivery f. o. b. cars Bellows Falls, Vermont, of the machinery described in the accompanying specifications, which are hereby made a part of this agreement. * * *

"ARTICLE 2. The party of the second part hereby agrees to pay the said party of the first part for work and material as set forth in article 1, the sum of two thousand dollars. * * * Sixty-five *per centum* of the contract price on receipt of bill of lading. Balance, thirty days after successful operation of the machinery and acceptance by the architect, provided however, that the final payment shall be made not later than four months from the date of receipt of said bill of lading. * * *

"ARTICLE 4. This agreement shall supersede all previous agreements, if any, that may have been entered into between the parties hereto; such previous agreements, if any, being void, and of no effect. * * *

"GENERAL CONDITIONS. These specifications are for furnishing f. o. b. cars Bellows Falls, Vermont, the machinery hereinafter specified and described. The design, material and labor embodied in this contract, unless specified to contrary, are to be the best of the several kinds for their respective uses and subject to the approval of Joseph H. Wallace, New York City, hereinafter referred to as 'the architect,' and to his authorized representative. * * *

"GUARANTY. The contractor guarantees the workmanship and material to be strictly first class for the purpose and in the place where used. * * *

"CONSTRUCTION. The construction throughout is to be first class in workmanship and material, and the machine set up and tested in shop before shipment."

The plaintiff introduced in evidence a large quantity of correspondence leading up to the giving of the contract, and also gave oral testimony. An example is found in the testimony of Mr. Babbitt, the secretary, treasurer, and

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manager of the company, as follows, on his direct examination:

"*Q.* What can you say, Mr. Babbitt, about the use and purpose that these machines were to serve being explained to you before you commenced making them for the defendant company?

"*A.* That I understood nothing further with reference to the use to which they were to be put than as appears from the correspondence, and from having read the accounts in one or two of the trade papers of the Munising Company's plant, and suppposing they would be put to the regular purpose of a double drum slitting and winding machine, as such machines are commonly and ordinarily used in the trade, or in the manufacture of paper."

On the cross-examination as follows:

"*Q.* You made the claim that you were entitled to collect the balance whether the machines would operate or not, did you not?

"*A.* I think I maintained the claim that, if the machines were in accordance with the contract, I was entitled to collect; the contract didn't provide for operation.

"*Q.* Is it your claim with reference to this contract that you are entitled to recover in this case entirely independent of the question of whether or not the machines can be successfully operated?

"*A.* No; not independent of whether they can be or not; if operated under proper conditions.

"*Q.* Then you would say that you were not entitled to the balance unless the machines could be successfully operated?

"*A.* I should say I would not unless they could be successfully operated under proper conditions."

The assignments of error all relate to the charge of the court, or its failure to charge as requested by counsel. We quote from the charge as follows:

"There are many things in the case which are undisputed, and which, of course, starting out in the consideration of the issues which are in controversy, you take as true and as the basis from which to explore and canvass the grounds of contention. It is undisputed that these two machines were ordered by the defendant from the

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plaintiff after considerable correspondence and negotiations, and that finally a written contract was entered into, a contract which superseded all previous contracts, understandings, agreements, and negotiations which had been had. That contract was entered into on the 15th day of June, 1904. Following that, it is undisputed that these two machines were constructed by the Bellows Falls Machine Company, and were placed on board the cars there, shipped to, and received by, the Munising Paper Company at this place, and were received apparently in good condition. It is undisputed that the defendant set up those machines and tried to operate them, and that they did not operate successfully. It is undisputed that complaint was made to the plaintiff, and the plaintiff sent agents on to work upon the machines and endeavor to make them a success, and it is conceded that they were not run successfully in the defendant's mills. Following that, it is undisputed that the defendant, claiming the machines could not be made to work, boxed up the various parts, put them in condition for storage, and stored the two machines on its premises, notifying the plaintiff of that fact, and repudiating the contract, or, rather refusing to accept the machines they were furnished under the contract.

"The real issue, to state it concisely in the beginning of this charge, is whether or not these machines were of workmanship and material which were strictly first class for the purpose and the place where they were to be used. The question is whether the design and the material and the labor were the best of the several kinds for their respective uses. And the question in that connection is, Could they, as such, be successfully operated for the purposes for which they were constructed?

"Taking up the various requests which we have before us, you are instructed that it is the claim of the plaintiff that they were to furnish certain machinery to defendant, and were to receive in consideration a certain price therefor. The machinery was to be furnished, and the price paid, according to the terms of a written contract and specifications, which have been offered in evidence in this case. The plaintiff claims that the design, material, and labor used in the making of the machines were the best of the several kinds for their respective uses, and that the plaintiff furnished, at all times during the construction of this machinery, sufficient space and proper facilities for

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inspection, not only of the design, materials, and labor embodied in the contract, but also, when that was actually done, in submitting the machines to the architect or to his authorized representative. It is also claimed by the plaintiff that the workmanship and material used in making these machines were strictly first class for the purpose, and in the place where they were to be used, and you are instructed that, if you find by a preponderance of evidence that those claims on the part of the plaintiff were true, and that the machines made by the plaintiff for the defendant were made according to the contract and specifications, and, before they were placed on board the cars at Bellows Falls, were put in plaintiff's shop and tested before shipment, and that after being tested they were placed on board the cars at Bellows Falls, and everything done by the plaintiff that it was required to do under the written terms of the contract and specifications, then the plaintiff has done all that it was required to do, and is entitled to a verdict for the balance that is due for the purchase price of the machinery. This involves, you observe, a requirement that they should have done everything that they were required to do under the written terms of the contract and specifications, and one of the things they were required to do was to construct a machine of the kind contracted for, which could be made to operate successfully.

"The duty of the plaintiff ended in regard to these machines when they were placed on board the cars at Bellows Falls, Vt. And if you are satisfied, from a preponderance of the evidence, that the plaintiff manufactured the machinery in accordance with the plans and specifications in every particular, and the machinery so manufactured was placed on board the cars at Bellows Falls in that condition, your verdict would be for the plaintiff. That, you understand, also involves the requirement that they should be manufactured so that they could be successfully operated if properly set up and properly operated. It was not the duty of the plaintiff to install this machinery in the defendant's plant at Munising, and it is claimed by the plaintiff that, after they had received word from the defendant that the machinery was not working satisfactorily, a representative of the plaintiff had been sent to Munising, and that they found that the machinery had been so erected in defendant's plant

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that some of the bearings bound, and the machines did not run properly. And the plaintiff further claims that they also found that the application of the power to those machines, by which they were to be operated, had been changed from a less angle to a greater angle than had been provided for in the plans and specifications, and also that the belt used in driving this machinery was a rubber belt, and not a leather one, and that parts of the machine had been broken and pounded out of shape in the work of setting up and installing the same. And it is claimed by the plaintiff that if the machine did not properly work on account of any of these reasons, it was not the fault of plaintiff, and would be no defense to recovery by the plaintiff in this action. You have the claim of the plaintiff in that respect, gentlemen, and now, in that connection, this is also given to you:

"'The plaintiff claims that the failure of the machine to operate was due in part to the use of a rubber belt by the defendant. The contract does not specify what kind of a belt should be used in these machines. The defendant was entitled to use any suitable belt, if desired, and if you find that the belt used was suitable for that purpose, and was such as is customarily used for such work, it is immaterial that the plaintiff's agent might personally have preferred some other kind of belt. That becomes a question of fact for you, to say whether or not the failure of the machines was due to the kind of belt used, in whole or in part.

"'The plaintiff also claims that the failure of the machines to operate was due in part to the angle at which the belt used in driving the machine was placed. It appears that this belt was placed at a somewhat different angle than that as shown on data sheet No. 731, furnished by the architect. This question is material only in so far as you may find it affected the efficiency of the machinery. The defendant claims that this did not in any way affect the efficiency of the machinery, and if you find they are right in so claiming, then you have a right to disregard the criticism of the plaintiff in reference to the driving arrangement.'

"And so it becomes a question of fact for you to determine in this case whether or not the changing from the plans in that particular had any bearing upon the successful or unsuccessful operation of these machines. The machinery that was to be manufactured by the plaintiff for the defendant in this case was to be made and shipped according to the terms of a written contract and specification, and you are instructed, as a matter of law, that you

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cannot go outside of the terms and provisions of this written contract in determining the responsibilities of the parties, either plaintiff or defendant, to this suit. It recited in article 4 of the contract that 'this agreement shall supersede all previous agreements, if any, that may have been entered into between the parties hereto; such previous agreements, if any, being void, and of no effect.' The plaintiff, in doing the work, in furnishing the material, workmanship, and design for making these machines, and, after they were manufactured, testing them in their shops, and afterwards placing them on board the cars at Bellows Falls, was expected to comply with the written terms and provisions in the contract and specifications, and if they have furnished the material, workmanship, and design in these machines, and have made them and placed them on board the cars, as the contract specifies, and you are satisfied of this by a preponderance of the evidence, your verdict will be for the plaintiff. It appears from the evidence in this case that, after the defendant had installed these machines in its manufacturing plant at Munising, the machines did not work satisfactorily to the defendant, and that the plaintiff was so advised, and sent to Munising several representatives to learn the cause of the trouble. It is the theory of the plaintiff that the defendant, when it attempted to assemble the different parts of the machine and erect and install the same in its plant at Munising, did not use the care and skill that was necessary in order to properly do the work, that the best kind of belt was not used, and that the application of the power by which these machines were to be worked was not as had been provided for in the plans and specifications, and that it was on account of these reasons, and not on account of any improper construction of the machinery, that they did not operate satisfactorily. It is also the theory of the plaintiff that, after the defendant had received these machines, and had installed them and started them in operation, they became convinced that it would be impracticable to take care of the large amount of paper in the manner they had planned for when they ordered the machines, and that, after having become so convinced of the impracticability of cutting and rewinding the paper of their manufacturing establishments as they had hoped they could do when they ordered these machines, they abandoned the machines, and sent word to the plaintiff that they could not make them work

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satisfactorily. Of course, gentlemen, you will bear in mind that all responsibility for these machines and their custody and control passed from the plaintiff at the time they were delivered on board the cars at Bellows Falls, Vt.; that is, responsibility for their custody and control and putting them in operation, not responsibility as to anything that had occurred before. The responsibility still rested on the plaintiff to have furnished machines that could be operated successfully. * * *

"Defendant's Request 1.

"'The contract between the parties in this case provides that the design, labor, and material embodied in this contract are to be the best of the several kinds for their respective uses, and the plaintiff, by the terms of the contract, guaranteed the workmanship and material to be strictly first class for the purpose and in the place where used, but the contract itself does not specify what those uses were, nor in what places the machines were to be used. It is the claim of the defendant that at and before the time this contract was entered into, its officers and agents fully explained to the officers and agents of the plaintiff that it was constructing a large paper mill at Munising, which would contain two paper-making machines, each having a capacity of 25 tons for each day of 24 hours, and that these double drum rewinding and slitting machines were to be placed at the finishing end of said paper machines, respectively, and should be capable of slitting and rewinding the product of said machines into marketable rolls, varying in width from seven inches up to the full width of the drum. If you find this claim to be sustained by the evidence, then you are instructed that it became the duty of the plaintiff, under this contract, to build and furnish double drum winding and slitting machines of such design, construction, and material as should be suitable and fit for the purpose and the place for which it was understood the defendant was to use them. And if you further find that the plaintiff failed to build and furnish machines of such character, your verdict should be for the defendant.'

"Defendant's Request 2.

"'The specifications attached to the contract between the parties in this case are general in their character. They do not, except in a few instances, give the dimensions of any parts of the machines, and these specifications do not constitute a pattern by which a machine could be made. It was left to the plaintiff to prepare proper plans and working drawings from which machines of a suitable character for the uses to be made of them under this contract

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should be made. This is not a case where it can be said that the defendant ordered machines to be made according to a certain pattern prescribed by it.'

"As to this payment for which suit is brought, and which is a final payment, the contract provides that it should be payable within 30 days after successful operation of the machinery and acceptance by the architect, provided that final payment should not be later than four months from the receipt of the bill of lading. This clause meant, giving some effect to each part of it, that the defendant was to make its tests within four months, and then, if the machines were successfully operated, and were accepted by the architect, to make the final payment. It is claimed by the defendant that these machines have not been, and cannot be, successfully operated; that they are not in accordance with the terms of the contract, and are practically worthless. The defendant bases its claim upon the alleged worthlessness of the machine rather than upon the lack of a certificate of the architect. And if you find that these machines have not been, and cannot be, successfully operated, though fairly tested by the defendant, then I instruct you that the plaintiff cannot recover. * * *

"So, gentlemen, you have these issues before you. Under the condition of the proofs and the pleadings in the case each of these parties is, in certain stages of the case, plaintiff and defendant. The plaintiff, as we generally use the term, the Bellows Falls Machine Company, has brought the suit, and seeks to recover the balance due for this machinery. The contract is in evidence, and the burden of proof is upon the Bellows Falls Machine Company to show that it has complied with the contract in the various particulars which I have explained. The balance due upon this contract, if it was fulfilled, according to the undisputed evidence, computing interest from the time agreed upon, is the sum of $1,033.17. It is conceded that if the plaintiff is entitled to recover at all, it is entitled to recover that amount. The plaintiff in the matter of recoupment becomes a defendant, and defendant becomes a plaintiff. There is an affirmative claim, set up by way of recoupment, by the Munising Paper Company, in which it seeks to recover back money already advanced in this connection, the payments amounting to $1,621.12, or 65 per cent. of the contract price, and for freight and labor and materials furnished to the Bellows Falls Machine

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Company while it was endeavoring to make the machine operate successfully at this place. The total amount of that, with interest figured, is $2,127.98. In order to recover that amount the burden of proof is upon the defendant to show that that amount of money was expended in connection with this contract, and to establish its claim by a preponderance of evidence. You are the judges of the credibility of the witnesses, and it is for you to say what the facts in this case are in regard to these various matters in issue, and, as I said in the outset, the essential and important issue before you, boiled down, is whether or not these machines, when they were delivered on board the cars at Bellows Falls, Vt., were of workmanship and material strictly first class for the purpose and the place where they were to be used, whether or not the design, material, and labor were the best of the several kinds for the respective uses, and whether or not these machines could have been successfully operated in the place and for the purpose for which they were purchased."

The difficulties in the case grow out of the construction which shall be put upon the contract. We quote from the brief sufficient to show the contention of counsel:

"The contract contains an express guaranty and certain recitals as to what the machines will do, but does not guarantee or represent that it will do what defendant expected of it. It does expressly provide that all previous agreements are superseded and are void. * * * The contention of the defendant was that these words, 'for the purpose and in the place where used' related to the purpose of the machine when assembled and set up in the mill of the defendant and to the place of the machine as a whole, wherever it was to be actually used by the defendant. Clearly this is not the meaning of the terms. The clause refers to 'workmanship' and 'material' both in the same sentence, and the words 'purpose' and 'place' relate as much to one as to the other. There was to be no 'workmanship' used after the machines were constructed. The workmanship and material for the construction of these machines were to be furnished at Bellows Falls, Vt., while the machines were being constructed. The provision that the material should be first class in the place where used related to the question of its location in the machine itself. No doubt, it seems to me, can arise un-

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der this language as to its meaning and application. It is plain and unambiguous. Neither of these terms have any reference whatever to the machine as a whole, when assembled in defendant's factory, nor to the purpose to be subserved by the machine when there, and surely not to the 'place' where it is to be used, in the sense of specifying the volume of work it was to be capable of doing. This will be still more plain if we consider what language would have been employed had it been the intention to guarantee the machine as a whole in the place where the machine was to be used, and to guarantee the specific volume and quality of the work to be done by it. It would have been as easy to express this intent as it was to express the intent that the workmanship and material were to be first class for the purpose and in the place where used in the construction of the machine."

Counsel then insist that the charge, from which we have already quoted, improperly presented this feature of the case to the jury.

In this connection it may not be inopportune to quote from a letter of plaintiff's:

"BELLOWS FALLS, VERMONT, Aug. 24, 1904.
"Messrs. MUNISING PAPER CO.,
"Mr. H. H. EVERARD, Supt.,
"Munising, Mich.

"*Gentlemen:* Referring to yours of the 18th inst., with reference to the two slitting and winding machines as per order of your company, on account of our desire to furnish your company with machines which should be a credit to us, and because we did not wish to use our regular patterns for these winders because of the lightness of the weight of the castings, which would be produced from them, we went to the expense of making new patterns for these winders, which are much heavier in construction. The delay incident to the making of such patterns has been longer than we had estimated, as a result of which we hardly think we shall be able to make shipment of the first winder inside of four or five weeks. We would also prefer, because of these particular winders being made from new patterns, if your company would be willing that we should do so, to make one winder complete and ship same to you for testing, after which, if it was found to be adequate in all respects, we could proceed promptly

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with the second one. We would esteem it a special favor if you would consent to this arrangement, as we should like to know that the first winder is adequate in all respects before proceeding with the second one. Will you please advise if you will consent to this arrangement, and oblige,

"Yours very truly,
"BELLOWS FALLS MACHINE CO."

Counsel also contend as follows:

"It was the contention of the plaintiff that the contract did not require it to set up the machines in defendant's mill, and that successful operation there was not contracted for as a condition precedent to the payment of the balance due on the machines. The defendant claimed the machines must be made to operate successfully according to the alleged understanding of the parties outside the written contract, and that until it did the plaintiff was not entitled to recover, but the defendant was entitled to recover back the money already paid, with interest and expenses. The court adopted the view of the defendant, and so instructed the jury. In this I think he was in error. Article 1 of the contract recited that the first party 'agrees to furnish all labor and material required for the complete delivery f. o. b. cars Bellows Falls, Vt., of the machinery described in the accompanying specifications, which are made a part of this agreement.' In article 2 the second party agrees to pay first party, 'for work and material as set forth in article 1.' The specifications prepared by the architect employed by the defendant prescribed the kind of material and labor to be employed; required plaintiff to provide sufficient, safe, and proper facilities at all times for the inspection of the work by the architect; prescribed the kind and size of machine, and specifically directed the construction of the various parts of the machine, including the frame, drums, slitter board, slitter shaft, spreader board, shaft, gears, driving arrangement, painting, and construction. * * * The plaintiff, therefore, built the machines according to the direction of the defendant, and could not be held responsible for their successful operation, unless the clause in regard to payments made it so. The contract provides that payments are to be made on the written certificate of the architect as follows:

"'Sixty-five *per centum* of the contract price on receipt of the bill of lading, balance thirty days after successful operation of the

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machinery and acceptance by the architect, provided, however, that the final payment shall be made not later than four months from the date of receipt of said bill of lading.'

"It was under this clause that the court adopted the view that defendant was entitled to recover its money back unless the machines had been successfully operated. I think this clause means that, if plaintiff, having performed its contract, shipped the machines, the defendant was to make the last payment in any event not later than four months from the date of the receipt of the bill of lading. This gives some effect to each part of the clause, as well as does the construction adopted by the court. The construction given this clause by the court practically made it obligatory upon the plaintiff to properly set up the machines under a contract which required it only to put them on board cars at Bellows Falls."

In making these various claims we think counsel overlooks some very important essentials. In the first place these machines were purchased to be used, and to be used in a certain place, and to accomplish certain results. The contract was made with these essentials all in view. The contract required, not only that the labor and material should be furnished, but that it should be furnished in such a way as to insure the complete delivery f. o. b. cars at Bellows Falls of completed machinery of the following character:

"The design, material and labor embodied in this contract, unless specified to the contrary, are to be the best of the several kinds for their respective uses and subject to the approval of Joseph H. Wallace, New York City, hereinafter referred to as 'the architect,' and to his authorized representative. * * *

"The contractor guarantees the workmanship and material to be strictly first class for the purpose and in the place where used."

Not only was the material and labor deemed important, but the design was deemed equally essential, and they were each to be of the best of the several kinds for their respective uses. No one contemplated the placing of machinery which would not accomplish results when used.

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This was made very clear by an essential requirement of the contract before payment could be enforced, as is indicated by the following language in relation to payments: "Balance thirty days after successful operation of the machinery," etc. To hold that payment must be made for the machines even though they could not be successfully operated would be to defeat the very purpose of the contract.

The case was carefully tried, and we find no reversible error therein.

Judgment is affirmed.

BLAIR, C. J., and GRANT, MCALVAY, and BROOKE, JJ., concurred.

GREEN *v.* MICHIGAN UNITED RAILWAYS CO.

1. CORPORATIONS— CONSOLIDATION— AMALGAMATION— STATUTORY AUTHORITY.

   A consolidation of domestic street and electric railways is not authorized by Act No. 143, Pub. Acts 1901, which applies to the consolidation of companies in adjoining States with corporations in Michigan.

2. SAME — LIABILITY TO CREDITORS OF CONSTITUENT COMPANIES— ESTOPPEL.

   A consolidated corporation is estopped to set up the invalidity of its consolidation as against the claim of a creditor of one of the constitutent corporations.

3. SAME—CONSOLIDATION OR MERGER—PLEADING—DECLARATION.

   A general allegation that the defendant consolidated with the corporation which was indebted to the plaintiff is sufficient to permit a recovery against the consolidated company.

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Certiorari to Jackson; Parkinson, J. Submitted October 13, 1909. (Docket No. 64.) Decided December 10, 1909.

Assumpsit by Thomas Green against the Michigan United Railways Company for the amount of a judgment. An order overruling a demurrer to the declaration is reviewed by defendant on writ of certiorari. Affirmed.

Thomas, Cummins & Nichols, for plaintiff.

Sanford W. Ladd, for defendant.

Plaintiff recovered a large judgment in one of the Federal courts of New York State against the Jackson & Suburban Traction Company. On May 8, 1908, he commenced a suit by summons in the circuit court for the county of Jackson against the Jackson Consolidated Traction Company, claiming that the Jackson & Suburban Traction Company had been consolidated with the Jackson Consolidated Traction Company. Plaintiff filed a petition in that case for an order to compel defendant in that suit to produce certain books and papers to enable him to declare. The circuit court granted the order. The defendant in that suit then applied to this court for a writ of mandamus to compel the vacation of the order. *Jackson Consolidated Traction Co.* v. *Jackson Circuit Judge*, 155 Mich. 522 (119 N. W. 915). We there held that if there is "a general averment that the present relator is a consolidation of the various companies named, then the necessity for a discovery does not exist; but, if it is necessary to aver in detail the facts showing the incorporation, then a discovery is essential. We think that the general allegation is sufficient." While that suit was pending it is claimed that there was another consolidation between the Jackson Consolidated Traction Company and the defendant in this suit, and that by means of such consolidation the defendant was obligated to pay the debts of the former company.

The declaration contains four counts. To all of these

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counts the defendant interposed a demurrer, which the court overruled. This order of the court is now before us for review by certiorari.

GRANT, J. (*after stating the facts*). The first and second counts, among other things, aver "that afterwards, to wit, on the 25th day of July, 1908, the said Jackson Consolidated Traction Company became and was merged, consolidated, and amalgamated with and into the defendant herein, the Michigan United Railways Company." If this count states a cause of action, it is not necessary to consider the validity of the other two counts.

The act, under which counsel for defendant assumes that this consolidation was effected, does not apply to the consolidation of street and electric railways organized under the laws of Michigan and lying wholly within its territorial limits. Act No. 143, Pub. Acts 1901. That act, both by its title and its body, refers to the consolidation of companies in this State with companies organized in adjoining States. In *Shadford* v. *Railway*, 130 Mich. 300 (89 N. W. 960), the defendant interposed the defense that no such consolidation was authorized by the laws of this State. To this contention this court replied that the defendant was not in a position to raise the question. The same rule applies here.

The two counts alleged generally a consolidation between the Jackson Consolidated Traction Company and the defendant. It is a general allegation, sufficient under the holding in *Jackson Consolidated Traction Co.* v. *Jackson Circuit Judge*, *supra*. If the plaintiff, upon the trial, can show a consolidation under which the law imposes upon the defendant the obligation to pay the debts of the former companies, the plaintiff will be entitled to recovery.

The order overruling the demurrer is affirmed, and the case remanded for further proceedings.

BLAIR, C. J., and MOORE, MCALVAY, and BROOKE, JJ., concurred.

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AINSWORTH v. MUNOSKONG HUNTING & FISHING CLUB.

1. BOUNDARIES — GREAT LAKES — REAL PROPERTY — RIPARIAN RIGHTS.
   Riparian owners along the Great Lakes own to the meander line, outside of which the title is in the State in trust for its citizens.

2. SAME—RIVERS AND LAKES—NAMES.
   The name by which a body of water is designated does not determine its character or its relation to the Great Lakes.

3. CONSTITUTIONAL LAW—TREATIES—COURTS OF STATES.
   Treaties between the United States and Canada, fixing the boundary lines between the countries, are the supreme law of the land, binding upon State courts.

4. SAME—TREATIES—ACTS OF CONGRESS.
   Acts of congress affecting the terms of treaties are not subject to the jurisdiction of the courts but relate to the political department of government.

5. SAME—STATUTES—EFFECT OF CONGRESSIONAL ACTS.
   An act of congress (29 U. S. Stat. 54), for the regulation of anchorage in St. Mary's river, will not be held to effect a change by implication in the relation of Munoskong Bay to Lake Huron by making it a part of St. Mary's river, notwithstanding the terms of the statute affect the bay and include it within the regulations.

6. BOUNDARIES—GREAT LAKES—BAYS—RIVERS.
   A bay about six miles in length and breadth, known as Munoskong Bay, connected with Mud Lake, from the head of which to Lake Huron is a distance of 24 miles, navigable and practically level with Lake Huron, and having a similar current, is a part of it and not of St. Mary's river; the riparian owners having title to the meander line of the bay.

Appeal from Chippewa; Steere, J. Submitted October 13, 1909. (Docket No. 76.) Decided December 10, 1909.

Bill by Corydon E. Ainsworth and Frank Trempe against the Munoskong Hunting & Fishing Club to en-

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join the interference with hunting wild fowl on navigable waters. From a decree for complainants, defendant appeals. Affirmed.

E. S. B. Sutton, for complainants.

Sharpe & Handy (*John H. Goff*, of counsel), for defendant.

A complete statement of the averments in the bill of complaint is found in 153 Mich. 185 (116 N. W. 992, 17 L. R. A. [N. S.] 1236, 126 Am. St. Rep. 474), when the case was before us upon demurrer, and the court below sustained the demurrer and dismissed the appeal. That decision was reversed, and the case remanded for answer by the defendant. The answer was duly filed, issue joined, proofs taken and decree rendered for complainants enjoining the defendant from interfering with the right of complainants to fish and hunt upon the water described in the bill of complaint. The answer denies that the subaqueous land of Munoskong Bay is held by the State of Michigan, and avers that the waters of said bay are a part

The following is the opinion referred to on page 71:

Is Munoskong Bay a part of the St. Mary's river, or of Lake Huron? Since the time of their discovery the varying characteristics of the connecting waters between Lake Superior and Lake Huron have led to more or less uncertainty and confusion in naming and classifying them. In the earliest accounts of them the Jesuit fathers, in their "Relations," describe those waters sometimes as a strait, and at other times as a river, and, following them, explorers, travelers, and experienced writers, as well as surveyors, geographers, and hydrographers have disagreed as to what those waters are and how they should be named and designated. Some insist that the entire stretch of water from Iroquois to Detour is a strait only; others, that it is a river the whole distance; others, that it is part strait and part river. Some consistently call it at all times a river, others a strait, and some speak of it interchangeably as a strait and a river. The testimony given in this case is also along somewhat conflicting lines. An examination of the charts and undisputed natural features of this waterway shows the reason of such confusion. Between Detour on Lake Huron and Point Iroquois on Lake Superior, we find, at different places, an endless diversity of

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of the St. Mary's river, and the rights of defendant as riparian owner extend to the middle thread of that stream. The answer admits that the agents and servants of defendant interfered with the attempt of complainants to hunt as averred in the bill, but denies that such acts were done maliciously. The answer asserts ownership in defendant, and avers it has exclusive right to hunt and fish at the place named. The answer further avers that the defendant, has at great expense erected a clubhouse, purchased the land surrounding said bay, and has sown the bay with rice and other vegetables and grain suitable for the feeding of wild fowls; that it has prepared such waters as a game preserve, and owns the exclusive control over such waters and should be protected therein.

Munoskong Bay is connected with Mud Lake at its upper end. The dimensions of Munoskong Bay are not stated in the record. Applying the scale of miles found upon the map, we find it to be about 6 miles east and west and about 5¾ miles north and south. The defendant owns all the lands around this bay except a fraction of an acre. Two rivers enter into Munoskong Bay at its west side.

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shores, shapes, sizes, and courses of water, with varying depth, width, and flow. Kohl in his "Wandering Round Lake Superior" (page 302) thus well describes it:

"The outpour of water at the eastern end of the lake (Superior), called the St. Mary's river, is a combination of several variously formed waters. The river divides into several broad arms, which separate, unite, and then divide again. Repeatedly these arms collect in large pools, when they become calm, and then shoot in narrow passages from one lake to another, thus forming rapids."

Along this waterway, according to the point of observation, are found bays, straits, lakes, rivers, and rapids, well defined, and free from any doubt when considered individually. Conflicting property interests have brought the matter before our courts, from time to time, and it is now well settled that a part of these connecting waters constitute a river, giving to the shore owner all the riparian rights that name implies in Michigan. (Citing cases). It has also been held by our Supreme Court in *Sherwood* v. *Commissioner of State Land Office*, 113 Mich. 227 (71 N. W. 532), that the river does not extend to Detour Passage, and that Sweet's Island, lying above the passages, is in a part of Lake Huron. But

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It is navigable, and has been navigated, for many years, by boats and tugs drawing from 4 to 10 feet of water. The water for a long distance from the shore is shallow, the home of fish and the resort of wild game.

GRANT, J. (*after stating the facts*). It is the established law of this State that riparian owners along the Great Lakes own only to the meander line, and that title outside this meander line, subject to the rights of navigation, is held in trust by the State for the use of its citizens. Among these is the common right to fish and hunt. *La Plaisance Bay Harbor Co.* v. *City of Monroe*, Walk. Ch. (Mich.) 155; *People* v. *Silberwood*, 110 Mich. 106 (67 N. W. 1087, 32 L. R. A. 694); *People* v. *Warner*, 116 Mich. 228 (74 N. W. 705); *State* v. *Shooting Club*, 127 Mich. 580 (87 N. W. 117); *Lincoln* v. *Davis*, 53 Mich. 375 (19 N. W. 103, 51 Am. Rep. 116). In these cases, and others cited therein, the subject has been fully discussed, and further discussion here would be unprofitable.

The sole question now before us is whether Munoskong Bay is included in the waters of Lake Huron or whether

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the question of how near the two Great Lakes, Superior and Huron, approach each other, and where the St. Mary's river begins and ends, is yet undecided.

It seems to have become a custom, though not universal, not only among sailors and others who have occasion to refer to them, but also government officials, on their charts and in their official reports, to designate the various parts of these connecting waters by their specific names when referring to any particular place, as Detour Passage, Mud Lake, Hay Lake, Lake George, the East, West, and Middle Neebish, the Falls of St. Mary, Waiska Bay, etc., and to refer to all the sheltered and connecting waters between Detour and Point Iroquois, collectively, as the "St. Mary's river." This general use of the name "St. Mary's river," for the stretch of navigation referred to, does not serve to clear or settle the question before us. The essential thing to determine is what the specific water under consideration really is, not what it may be loosely or collectively called. Manifestly, the river, as such, in legal effect, does not reach either Detour or Point Iroquois. The widening waters at either end between these points are on the level of the

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it borders on the river. If the former, the defendant has no exclusive rights of hunting and fishing, and the decree of the court is right. If the latter, then the defendant own the subaqueous land to the middle thread of the river, and the decree is wrong. Cases involving the title of lands from the Rapids of Sault Ste. Marie to the foot of Neebish Rapids are not controlling; and, in fact, throw no light upon the character of the waters below the Neebish Rapids, and do not control the question now before us. Travelers, explorers, surveyors, and some decisions, where this precise question was not involved, sometimes refer to the waters as the "Straits," sometimes as the "River Sault Ste. Marie," and sometimes as the "Passage." The question cannot be determined by the names which these various parties have seen fit to apply to this body of water, but it must be determined by the character of the water itself, from the treaties with England and from the adjudicated cases upon the subject.

We said in *People* v. *Neal*, 143 Mich. 275 (106 N. W. 859):

"'The name cannot alter the thing. It cannot be received as a proper definition of the character of the water.'" *State* v. *Gilmanton*, 14 N. H. 477.

Great Lakes they connect with, and rise and fall with them, have irregular shores and a broad expanse of several miles, contain in places many islands, and are subject to storms and waves which render their navigation in small boats dangerous, and, at times impossible, and they present the general characteristic of the numerous inlets and bays connected with the Great Lakes. The only suggested or possible difference between them and others is the increased movement of water over and through them in its passage from Lake Superior to Lake Huron. Lake Michigan also empties into Lake Huron through the Straits of Mackinac. The fact, standing alone, cannot be taken as a test for a river. The fact that there is some current in a body of water is not, in itself, in every instance, sufficient to make it a river or a stream, nor will the swelling out of a stream into broad sheets of water always make it a lake or bay. Through all lakes which have an outlet, and all bays into which streams enter, there is some current of water towards

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In *United States* v. *Rodgers*, 150 U. S. 249, at page 261 (14 Sup. Ct., at page 114), the court said:

"The nomenclature, however, does not change the real character of either, nor should it affect our construction of terms properly applicable to the waters of either."

From the head of the Rapids of Sault Ste. Marie to the foot of the Neebish Rapids there is a fall of 20.75 feet, and there is a decided and, in some places, a very swift current, and consequently the riparian owners own the subaqueous lands to the middle thread of the river. Below the Neebish Rapids a different condition exists. At the foot of the Rapids the waters fall to the level of Lake Huron. Mud Lake is from 5 to 6 miles in width. Munoskong Bay is an arm of Mud Lake, and, as above shown, is navigable for boats drawing 10 feet of water. A glance at the map will show the extent of these waters below the Neebish Rapids and the many islands situated therein, including the west end of Georgian Bay and the entrance or passage at Detour to the main body of Lake Huron. The distance from the head of Mud Lake to Lake Huron is 24 miles. An engineer testified that during this distance the fall of water is very slight; "a fair estimate would probably be two-tenths of a foot." As-

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the sea. If below an expanse in a stream it resumes its definite characteristics as a river, and continues on as such, the expanse is part of the river.

The report of Engineer Haskell on discharge measurements made in St. Mary's river in 1896, found in "Reports U. S. Lake Survey," 1897-1900, page 4092, is strongly urged in support of defendant's contention. In harmony with the usage of his department, Prof. Haskell calls all the connecting waters between Detour and Iroquois the "St. Mary's river," and gives its length as 62 miles. The entire fall or difference between the levels of Superior and Huron, he gives as 20.75 feet. He estimates the fall above the rapids at Sault Ste. Marie, as .41 of a foot. From the head of Mud Lake to Lake Huron (his given length of the river would put it at Detour) he gives as 24 miles, and "the fall but slight; a fair estimate would probably be .2 of a foot." He regards the current in such stretches as "almost inappreciable." While it is true that he calls Mud Lake, which includes the waters under consideration, a part of St.

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suming this estimate to be correct, the fall would be one-tenth of an inch per mile, an almost imperceptible variation. The maps and surveys place all these waters upon a level with Lake Huron. Of course there is more or less of a current from the foot of Neebish Rapids to Detour. There is also more or less of a current through all the waters of the Great Lakes, from Lake Superior to the ocean. There is also a current through the straits of Mackinac, between Lake Huron and Lake Michigan, in which islands are located. Mr. Mondor, a witness for defendant, who had traversed these waters as a sailor for some 32 years, testified:

"The St. Mary's river in my opinion does not run to Detour, but stops at the Neebish."

And one Lanstra, master of a lighthouse tender and a witness for the defendant, testified:

"Mud Lake is on a level with Lake Huron, and they are on the levels mentioned in this chart as levels of Lake Huron."

This witness called these waters a river because they were so denominated on the chart. He said that if the islands were not there he would not call it a river. There are undoubtedly many currents through these islands, all tending towards the main body of Lake Huron just as the

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Mary's river, his description of those waters does not seem to bear out the name, and in the use of the name he extends the river beyond a point where our Supreme Court has expressly declared to the contrary.

Other scientific men tell us the river loses its characteristics as such, and ends at the foot of the Neebish Rapids. Dr. Houghton, the eminent geologist, apparently coasting up and describing the east side, says:

"Commencing with the mainland at the first or lower point of contraction in the Montreal channel of the St. Mary river. * * * At that point in the Montreal channel before alluded to, the first perceptible current was noticed, and this may, therefore, in reality, be considered as the termination of this arm of Lake Huron, as well as the commencement of the St. Mary river." Michigan S. D. 1840, Vol. 2, pp. 72, 73.

Henry R. Schoolcraft, the eminent explorer, geologist, and In-

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waters of Lake Huron tend to the south to the lakes below. The early explorer entering the Detour Passage, after sailing a few miles and finding a great expanse of water extending in both directions as far as the eye could reach, now known as Potagannissing Bay, had no occasion to suppose that he was in a river or in any other water than a part of the Great Lake. So the navigator of today would have no more occasion to think he had left a lake and entered a river than he would have in passing some of the channels between the numerous islands along the shore. It is established beyond all controversy that the waters above Detour rise and fall as the great body of water south of it rises and falls.

It is not important here to state the provisions of the early treaties between the United States and Great Britain, Treaties of Paris 1782 and 1783, and the Treaty of Ghent in 1814. We think there is no question but that the two governments by these treaties considered the waters from Detour to the foot of Neebish Rapids as a part of Lake Huron, and made these treaties upon that understanding. These treaties, unless abrogated or changed by treaty or act of congress, became the supreme law of the land, and are binding upon the courts. Acts of congress, however, affecting the terms of such treaties are not subject to the

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dian historian, who lived many years on the St. Mary's river, and in his writings often mentions it both as a strait and a river, says:

"The lake or strait may be supposed to cease, and the river to commence, at the foot of the first rapids, called Miscoutin or Neebish, as there is no perceptible current below it, where the strait assumes a great width, and is filled with innumerable islands." Narrative Journal of Travels, A. D. 1820, p. 128.

Col. McKinney in his "Tour of the Lakes," published in 1826, being a narrative of the second Cass expedition to the upper lakes, after describing the lower reaches between Detour Passage and St. Joseph's Island, says (page 172): "At two o'clock entered the mouth of St. Mary's; distant from Sault 21 miles"—which by the old channel through Lake George, then the only route navigable by large boats would be the East Neebish.

Mrs. Jameson, an extensive traveler and well-known writer, telling of a trip by canoe from Mackinaw to Sault Ste. Marie, in

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jurisdiction of the courts; they belong to the political department of the government. *Whitney* v. *Robertson*, 124 U. S. 190–194 (8 Sup. Ct. 456); *Fong Yue Ting* v. *United States*, 149 U. S. 698–720 (13 Sup. Ct. 1016); *Thomas* v. *Gay*, 169 U. S. 264 (18 Sup. Ct. 340).

It is alleged by counsel for defendant that congress has established that the entire stretch of water from Point Iroquois to Point Detour constitutes a river, citing Act March 5, 1896, chap. 49, 29 U. S. Stat. 54 (U. S. Comp. Stat. 1901, p. 3551). That act is entitled, "An act relating to the anchorage and movements of vessels in St. Mary's river. For the purpose of regulating navigation by suitable rules and regulations it provides for "governing the movements and anchorage of vessels and rafts in St. Mary's river, from Point Iroquois, on Lake Superior, to Point Detour, on Lake Huron." It is not claimed that this act is at all in conflict with the treaty rights between the United States and Great Britain. It is claimed that this act takes all the waters on the American side of the boundary line out of the provisions of the treaty by which it was found to be a part of Lake Huron, and changed the character of this water from a lake into a river. The term "St. Mary's river" in this act was used undoubtedly by congress for convenience in designating the waters between the two points mentioned for the purposes of navi-

her book entitled "Winter Studies and Summer Rambles," published in 1889, after describing the entrance at Detour Passage and the journey up past the lower end of St. Joseph's Island, says:

"We could not land and light a fire till we reached the entrance of St. Mary's river between Neebish Island and the mainland."

In the case of *Sherwood* v. *Commissioner of State Land Office*, before mentioned, our Supreme Court, speaking of Sweet's Island, which is located near the mainland between Detour Passage and St. Joseph's Island, briefly but clearly disposes of the claim that it lies in St. Mary's river, as follows:

"We are of the opinion that this island is within the body of water known as Lake Huron."

From the brevity of this opinion it has been argued that the case may not have been as fully and carefully considered as some others.

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gation. There is nothing in the title or body of the act to indicate any intention to change the northern boundary line of Lake Huron. There is nothing in it to indicate that it was directed against the treaties between the two governments, or that there was any intent to change the character of the water from a lake into a river. The law will not permit such an important change to be accomplished by implication.

Under the contention of the defendant the entire body of water from Point Detour to the Neebish Rapids is a river, and every owner of land along its tortuous shore owns to the middle thread of the stream and the islands lying between. This question, however, is determined against the defendant by *Sherwood* v. *Commissioner of State Land Office*, 113 Mich. 227 (71 N. W. 532). The relator in that case claimed to own Sweet's Island, located 600 feet from shore and about 7 miles above Point Detour, by virtue of his riparian ownership. It was distinctly held that the island lay within "the body of water known as Lake Huron," and was therefore within the rule of *People* v. *Silberwood, supra*.

The case of *People* v. *Silberwood* involved submerged lands lying in Lake Erie and Detroit river. *People* v. *Warner*, supra, involved islands on the shores of Saginaw Bay.

Just how thoroughly it was briefed, or how much time was spent in preparing the decision, we are not advised, but there is no uncertainty in the language used, and it is now the law. The reasons which must have governed the decision in that case apply with equal force to Mud Lake and Munoskong Bay, which is a part of it. It is but a continuation of those large waters at the north end of Lake Huron known as Georgian Bay and the North Channel. It is true that they are confined and sheltered on the east by St. Joseph's Island, a large island surrounded by deep water, capable of navigation with large vessels, and that the St. Mary's river flows into Mud Lake from the north. But it is in the basin of, and has the same water level as, Lake Huron, and rises and falls with it. If St. Mary's river were diverted elsewhere and eliminated from our consideration, and Lake Huron maintained its present level, Mud Lake, as a bay some 12 or 14 miles long, with a varied width of from 2 to 6 miles,

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The presiding judge who heard this case in the court below has lived at Sault Ste. Marie for more than 30 years, and is familiar with the character of the water from the Falls of Sault Ste. Marie to Detour. The case is of such importance that we deem it well to print in the margin his opinion, omitting therefrom his statement of facts, the claims of the parties, and citations of authorities.

The decree is affirmed with costs.

BLAIR, C. J., and MOORE, MCALVAY, and BROOKE, JJ., concurred.

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would maintain its present level, size, condition, and general appearance, absolutely without change. The only exception is that there would be less current spread over, through, and running out of it. But current alone cannot make waters a river. Furthermore, the extent and regularity of the current relied upon is a matter in dispute. It is the testimony in this case, and a well-known fact, of which the court could almost take judicial notice, that ice forms earliest, thickest, and lasts the longest on Mud Lake and down past Point Au Frene, towards Lime Island. Navigation is often delayed latest there, at the opening of navigation, of any point on the Lakes. The great fleets starting for Lake Superior in the spring frequently are detained there by solid ice when the St. Mary's river above and the Great Lakes outside are clear. If it were a river, with a strong and constant current running through it, those conditions could not exist. The rise and fall of the water in Mud Lake and Munoskong Bay depend on the rise and fall of Lake Huron. This, with the relative position, size, and general features of that body of water, fixes its characteristics as that as an arm or bay of Lake Huron, subject to the rules of law governing the Great Lakes.

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ROSEN *v.* ROSEN.

1. USURY—CONTRACTS—SALES—INTEREST.
   Every written agreement to pay interest in excess of the legal rate, however well disguised, is in violation of law and usurious.

2. SAME.
   A contract by which one partner agrees to purchase the interest of another and to pay him an amount computable under the terms of the agreement, and, if payment shall not be made in a given time, to pay an additional sum, more than seven per cent. of the principal, is void as usurious. Act No. 207, Pub. Acts 1899, 2 Comp. Laws, § 4856 *et seq.*

Error to Wayne; Murfin, J. Submitted October 14, 1909. (Docket No. 26.) Decided December 10, 1909.

Assumpsit by Louis Rosen against Aaron D. Rosen upon a contract for the sale of a partnership interest. A judgment for plaintiff on a verdict directed by the court is reviewed by defendant on writ of error. Reversed, and judgment entered for defendant.

Maybury, Lucking, Emmons & Helfman (*Walters & Walters*, of counsel), for appellant.

Bernard B. Selling, for appellee.

MCALVAY, J. The parties to this suit and Myer S. Fink, who were copartners conducting a merchandise business under the firm name of A. D. Rosen & Co., desiring to dissolve the copartnership, and the defendant desiring to purchase the interests of plaintiff and Mr. Fink and the good will of the business, entered into a written agreement on November 16, 1905, which provided in detail the method by which the value of the assets and the amount of the liabilities should be ascertained, the run-

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ning expenses of the business provided for, and the respective shares of the partners computed and determined. By this writing defendant agreed to purchase on January 1, 1906, the interests of the other partners and the good will of the business "at full face value as shown by the books of the firm of A. D. Rosen & Co. on that date, as hereinbefore provided for without any deduction whatsoever." The contract, among other things, provided: That each retiring partner should remain in the store and have access to the books until paid in full. The defendant who purchased was limited as to the amounts he could withdraw from the business and was prohibited from discontinuing the business or incumbering the property. Accounts receivable and collections were to be assigned to Mr. Fink, out of which he was to pay the debts of the old firm, the salaries and expenses of the new business, and then the amount due him as his share. Mr. Fink was to draw a salary of $250 per month to be charged as an expense of defendant's business from January 1, 1906, to May 1, 1906, the date when the payment for his interest was to be made, and until he was paid in full. Plaintiff was "to take charge of the office work of defendant and see the trade" of defendant from January 1, 1906, until he was paid in full, at a salary of $125 per month to be charged as an expense of defendant's business. This contract was a very long one, covering 10 printed pages, containing 27 numbered paragraphs with numerous subdivisions. It is drawn with great care, and counsel on both sides on the trial claimed there was no ambiguity in its terms.

No further statement of the terms of the contract need be made, for the purposes of this case, than to quote the paragraph over which this dispute arises. This is paragraph 11, and reads as follows:

"The said Louis Rosen is not to receive anything except his salary until Myer S. Fink has been paid in full in cash. The said Louis Rosen is to be paid one-half of the amount coming to him under this agreement on or before July 1,

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1906, and the remaining one-half by December 31, 1906, together with the sum of $2,000.00 for the use of said Louis Rosen's money during said period; but said Aaron D. Rosen shall have the option of paying said Louis Rosen less than one-half of said interest on July 1, 1906, in which case said Aaron D. Rosen shall pay $4,000.00 on December 31, 1906, for the use of said Louis Rosen's capital."

Plaintiff's interest in this property, as duly ascertained under the terms of the contract, was agreed upon on the trial, and amounted to $15,187, and also that defendant had paid plaintiff prior to July 1, 1906, $5,555.88 and prior to December 31, 1906, a total of $13,782.69, and on January 7, 1907, the sum of $506.75.

Plaintiff, who testified that he was an equal partner, had some dispute with defendant relative to certain items, which he claimed had not been paid, and brought this suit to recover under this contract for such items, and for the sum of $2,000 claimed by him under the terms of paragraph 11 of the contract. During the trial an adjustment was made of all matters in suit except the above claim for $2,000. Defendant with his plea gave notice of payment in full, and that the contract was usurious. The court refused to direct a verdict for defendant on the ground that the contract was usurious, and did direct a verdict for plaintiff for the sum of $2,000, with interest. This is assigned as error by defendant, who, upon review by this court, asks a reversal of the judgment entered against him. There is but one question in the case: Was this contract usurious?

The facts in the case are not in dispute. These parties have reduced their agreement to writing, and it is admitted that there is no ambiguity in the paragraph under consideration. The writing then speaks for itself, and its language must be construed by the court according to the usual and ordinary meaning of the words used. Paragraph 11, after providing that plaintiff is not to receive anything except salary until Mr. Fink has been paid in full in cash, fixes the terms of payment "of the amount

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coming to him under this agreement," one-half on or before July 1, 1906, and the remaining one-half on or before December 31, 1906, "together with the sum of $2,000 for the use of said Louis Rosen's money during said period." Defendant is then given "the option of paying said Louis Rosen less than one-half of said interest on July 1, 1906," in which case he "shall pay $4,000.00 on December 31, 1906, for the use of said Louis Rosen's capital." This purchase was consummated January 1, 1906. After that date the business was conducted as defendant's business. The payments to plaintiff were to be made in six months and one year, together with $2,000 "for the use" of his money during that period. We can conceive of no simpler or plainer statement which could possibly be made to indicate that this $2,000 was to be in payment for the use of this money. These words selected with care may be said to be self-construing. Explanation and argument cannot add to, or take from, the clear meaning expressed.

The contention of plaintiff that agreements cannot be held usurious except in cases where the transaction is a loan of money or extension of pre-existing debt, while true under many statutes, does not apply in this State, for the reason that our statute (section 4857, 2 Comp. Laws) is broader and includes any and all contracts and assurances. It reads:

"SEC. 2. No bond, bill, note, contract or assurance, made or given for or upon a consideration or contract, whereby or whereon a greater rate of interest has been, directly or indirectly reserved, taken or received, than is allowed by law, shall be thereby rendered void; but in any action brought by any person on such usurious contract or assurance, * * * if it shall appear that a greater rate of interest has been directly or indirectly reserved, taken or received, than is allowed by law, the defendant shall not be compelled to pay any interest thereon."

The authorities in those States where the statutes like ours include all contracts and assurances are harmonious in holding that every written agreement to pay interest in excess of the legal rate, however well the unlawful inter-

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est may be disguised, is in violation of law and usurious. *Cooper* v. *Tappan*, 9 Wis. 361; *Compton* v. *Compton*, 5 La. Ann. 615; *Evans* v. *Negley*, 13 Serg. & R. (Pa.) 218. This contract provides without qualification that this $2,000 was to be paid when the last payment was due for the use of the money during said period. This is the clause which fixes the usurious nature of the agreement.

It cannot be said, as claimed by plaintiff, that the contract fixed two prices, one for cash and the other for a time sale, for the reasons:

(1) That by the terms of the contract defendant agreed to pay the full face value, without any deductions whatsoever, in the manner provided in the contract, which minutely included all the property of every kind, and the share of plaintiff was found to be $15,187; no second or other price being mentioned or contemplated.

(2) That the contract itself, as already stated, characterizes and designates that the $2,000 was to be paid "for the use of the money."

Exactly this question has not previously been before this court. In a case somewhat similiar (*Anderson* v. *Smith*, 108 Mich. 69 (65 N. W. 615), and same case 103 Mich. 446 (61 N. W. 778), the court held that a stipulation to pay $2,000 in the terms there given was usurious. See, also, *Bullock* v. *Taylor*, 39 Mich. 137 (33 Am Rep. 356); *Green* v. *Grant*, 134 Mich. 462 (96 N. W. 583); *Stack* v. *Cedar Co.*, 151 Mich. 21 (114 N. W. 876, 16 L. R. A. [N. S.] 616).

In our opinion defendant has shown such a defense that, as a matter of law, the court should have directed a verdict in his favor on the ground that the contract was usurious.

The judgment of the circuit court is reversed and set aside, and as the only question is one of law, and a new trial cannot be of any purpose, a judgment will be entered in this court in favor of defendant, with costs of both courts.

BLAIR, C. J., and GRANT, MOORE, and BROOKE, JJ., concurred.

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ANDREWS v. OSBORN.

1. APPEAL AND ERROR—EQUITY—PLEADING—PLEA—DUPLICITY.
   The objection that a plea to a bill in equity setting up the defenses of res adjudicata and of the statute of limitations is bad for duplicity, will not be held decisive on appeal where the point was not made in the trial court.

2. EQUITY PLEADING—PLEA—DUPLICITY.
   The court in chancery may permit a double plea.

3. SAME—INJUNCTION BILL—JUDGMENT.
   A bill to restrain the enforcement of a judgment at law must be positive, explicit and certain.

4. SAME—FRAUD—CONCLUSIONS IN PLEADING.
   If fraud is the ground upon which the aid of equity is asked to enjoin the enforcement of a judgment, it is not sufficient to incorporate in the bill general allegations of fraud, deceit or misconduct, but the specific facts constituting the alleged fraud must be set forth.

5. ESTATES OF DECEDENTS — ALLOWANCE OF CLAIMS — RES ADJUDICATA—JUDGMENTS.
   The allowance of a claim against an estate of a deceased is conclusive on all persons interested whether residents of the State or not, if the steps required by statute are regularly taken to notify the parties in interest, unless successfully impeached for fraud.

6. SAME—ALLOWANCE OF CLAIMS—COLLATERAL ATTACK—JUDGMENTS—PLEADING.
   A bill which avers that a claimant fraudulently presented a claim against an estate, and that it was false and fraudulent and he procured its allowance by false testimony, is too general to warrant relief for fraud.

7. EQUITY—LACHES—PLEADING.
   Laches may bar a complainant from setting aside the allowance of a claim in probate when he permits several years to intervene before filing the bill, which fails to negative knowledge of the death of deceased and her ownership of property.

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8. SAME—ESTATES OF DECEDENTS—ALLOWANCE OF CLAIMS—CONCLUSIVENESS OF JUDGMENT—SETTING ASIDE—LIMITATIONS.

The defense of the statute of limitations should be raised before the commissioners to whom a claim is presented, or on appeal, and is barred as a ground for setting aside the judgment by the allowance of the claim.

Appeal from Barry; Smith, J. Submitted October 12, 1909. (Docket No. 47.) Decided December 10, 1909.

Bill by L. F. Andrews and others against George Osborn, Alice Sturtz, and others, to set aside a claim allowed against the estate of Jennie Charlton, deceased. From a decree dismissing the bill, complainants appeal. Affirmed.

Finley & Gallinger and *Colgrove & Potter*, for complainants.

Thomas Sullivan, for defendant Sturtz.

BLAIR, C. J. Complainants and appellants as heirs at law of Jennie Charlton, formerly of Barry county, in this State, filed their bill of complaint for the purpose of setting aside proceedings in the probate court of said county, resulting in the allowance of a claim filed by Eli Charlton against the estate of his said wife Jennie, as well as an administrator's deed of real estate in said county, of which the said Jennie Charlton was seised and possessed at the time of her death, executed under the order of said probate court. Mrs. Charlton died on the 7th day of August, 1894, intestate, her husband surviving her until the 21st day of July, 1908, when he also died, leaving a will under which the defendants claim. The bill sets forth that the complainants were all nonresidents of the State of Michigan, and that none of them had actual notice of the probate of the estate of Mrs. Charlton, or the pendency of the petition for the probate of the same, or of the order of publication made therein, or of the presentation of the claim of Eli Charlton against said estate, or of the allow-

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ance of said claim, or the application for the sale of the lands, or of any of the proceedings connected therewith; that the first actual notice received by them was after the death of said Eli Charlton—

"That the said Eli Charlton, husband of said deceased, well knowing the premises, but wrongfully contriving and intending to injure the estate of the said Jennie Charlton and the complainants herein in their right of inheritance, made and presented a claim to the probate court for Barry county, Mich., against the said estate of Jennie Charlton, deceased, a copy of which said claim is now on file in the office of the probate court for Barry county, Mich., is annexed hereto and marked 'Exhibit A'; that said account was wholly without merit; that it was false and fraudulent; that it was fraudulently and designedly trumped up in order to cheat, wrong, and defraud the estate of Jennie Charlton, deceased, and the complainants herein of their rights, and to fraudulently obtain the sale of the real estate of the said Jennie Charlton, deceased, and to fraudulently obtain the title thereof; that said claim was outlawed and barred by the statute of limitations, and upon its face showed that part of it did not accrue during the lifetime of said Jennie Charlton, and that part which did accrue during the life of Jennie Charlton showed upon its face that it was fraudulent, without foundation, and without merit, but, that notwithstanding the fraud upon the part of said Eli Charlton in presenting said claim, he, the said Eli Charlton fraudulently procured the allowance of said claim and fraudulently procured the sale of said real estate by proceedings had in the probate court for Barry county, Mich., and fraudulently bid in said property as a purchaser at said sale and in pursuance of said fraudulent design and conspiracy became the owner thereof."

To this bill of complaint defendants filed their plea, accompanied by an answer denying the fraud, and setting up in their defense as a bar the former adjudication in the probate court and the statute of limitations. It is urged by counsel for complainants that these defenses made by the plea are separate, inconsistent, and distinct, and that the plea is therefore bad, as held by this court in *Mains* v. *Steel Fence Co.*, 116 Mich. 538 (74 N. W. 735).

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It is alleged in the brief for defendants that no objection was made to the plea as being bad for duplicity in the court below, but the matter was argued on the sufficiency of the plea, and that this objection is now made for the first time in this court. This statement in the brief of defendants is not controverted upon the oral argument by counsel for complainants, nor is there anything in the record indicating that the question was formally raised in the court below. Inasmuch as the court below might have permitted the double plea if his attention had been called to the matter (16 Enc. Pl. & Pr. p. 608), and the case is fully briefed on both sides upon the material questions in the case, we are not disposed to determine the case upon the preliminary question of practice.

The allegations of the bill of complaint in equity to obtain an injunction against a judgment at law must be positive, explicit, and certain, and, if fraud is the ground upon which the aid of equity is asked in relieving against a judgment, it is not sufficient to incorporate in the bill general allegations of fraud, deceit, or misconduct, but the specific facts constituting the alleged fraud must be set forth. 23 Cyc. pp. 1039–1041. An examination of the bill of complaint in the present case discloses that all of its allegations are of the most general character so far as the allegation of fraud is concerned, and amount in substance to this: That the claimant, Eli Charlton, put in a false claim against the estate of his deceased wife, and supported it by perjured testimony. The record shows that all of the steps required by statute to charge the heirs at law and all other persons interested in the estate of Mrs. Charlton, whether residents or nonresidents of the State of Michigan, were regularly taken, and they are a bar to any further inquiry, unless successfully impeached for fraud. *Toll* v. *Wright*, 37 Mich. 93; *Shurbun* v. *Hooper*, 40 Mich. 503; *Norman* v. *Olney*, 64 Mich. 553 (31 N. W. 555); *Lafferty* v. *Savings Bank*, 76 Mich. 35 (43 N. W. 34); *Burgess* v. *Stribling*, 134 Mich. 33 (95 N. W. 1001); *Flynn* v. *Lorimer's Estate*, 141 Mich. 707 (105 N. W.

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37); *Draper* v. *Brown*, 153 Mich. 120 (117 N. W. 213).

The bill contains no allegation that complainants were ignorant of the death of Jennie Charlton at the time thereof, or that they were ignorant of her ownership of real and personal property, or that her death was in any wise concealed from them; and, in view of the strictness required in the statement of complainants' case by the rules of pleading, it might well be inferred that such allegation was omitted for the reason that it could not truthfully be made, in which event complainants' laches would be a complete answer to their bill of complaint. Waiving this question, however, the bill does not state such a case of fraud as to justify the intervention of a court of equity under the repeated decisions of this court. *Gray* v. *Barton*, 62 Mich. 186, 197 (28 N. W. 813); *Cleveland Iron Mining Co.* v. *Husby*, 72 Mich. 61 (40 N. W. 168); *Codde* v. *Mahiat*, 109 Mich. 186 (66 N. W. 1093); *Weisman* v. *Newton Beef Co.*, 154 Mich. 511 (118 N. W. 2).

It is also contended that the claim was void, and could not be allowed because it showed upon its face that it was barred by the statute of limitations because section 9375, 3 Comp. Laws, provides that "no claim barred by the statute of limitations shall be allowed by the commissioners in favor of or against the estate as a set-off or otherwise;" that, therefore, the allowance of the claim was a mere nullity. The answer to this contention is that the claim, which is fully set forth in the record attached to the bill of complaint and the plea, was not for the most part barred by the statute of limitations, but only certain items thereof, and it does not follow that these items might not have been shown by testimony to the satisfaction of the probate court to have come within some of the exceptions preventing the running of the statute; but, conceding that some of the items were unlawful claims, still these did not oust the court of jurisdiction, since other items were proper subjects for allowance, and the case falls within the decision of *Perkins* v. *Fairfield*, 11

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Mass. 227, rather than that of *Heath* v. *Wells*, 5 Pick. (Mass.) 140 (16 Am. Dec. 383). We are still of the opinion, moreover, previously expressed in *Shurbun* v. *Hooper*, 40 Mich. 503, that, "if there was any objection growing out of the statute of limitations to the validity of the claims passed upon, it should have been raised before the commissioners or on appeal, and cannot properly be considered in this action."

We are of the opinion that the circuit judge reached a correct conclusion, and the bill of complaint is dismissed, with costs to defendants.

GRANT, MOORE, MCALVAY, and BROOKE, JJ., concurred.

STENZHORN *v.* CITY ELECTRIC RAILWAY CO.

1. STREET RAILWAYS—NEGLIGENCE IN OPERATION OF CARS—CONTRIBUTORY NEGLIGENCE.

   A street sweeper working on a street car track, in the midst of a noise sufficient to deaden the sound of the gong of a car, is guilty of contributory negligence for placing reliance on his hearing only, and cannot recover for injuries sustained because of the motorman's failure to stop a car, which approached from the rear, running at ten miles an hour, and on which the gong was sounding.

2. SAME—CONTRIBUTORY NEGLIGENCE — DUTY TO PERSON GUILTY OF NEGLIGENCE.

   In the operation of cars on the public street it is not negligence to assume that a person standing on the track will hear the usual signals, until it becomes apparent that he is paying no attention to them.

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3. SAME—NEGLIGENCE IN OPERATION OF CARS.
It is error to submit to the jury the question of defendant's negligence in backing the car off the injured street sweeper, dragging him back several feet, where the evidence showed that the car backed because the current had been reversed to avoid the collision.

4. EVIDENCE—HEARSAY—RES GESTÆ.
Advice to the person operating the car, given after the accident, is inadmissible.

Error to Macomb; Law, J., presiding. Submitted October 13, 1909. (Docket No. 63.) Decided December 10, 1909.

Case by Philip Stenzhorn against the City Electric Railway Company for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

P. H. Phillips, for appellant.

Fred B. Brown, for appellee.

BLAIR, C. J. Plaintiff, while engaged in the performance of his duties as a street sweeper in the employ of the city of Port Huron, was struck by one of defendant's east-bound cars and seriously injured. At the time of the accident, about 10 o'clock in the forenoon, plaintiff was sweeping towards the east along the south rail of the track with his back towards, and directly in the path of, the approaching car from the west. Plaintiff testified:

"I was working on the track a few minutes just before the car struck me, and was facing the east. I was sweeping the street. I had been sweeping along the track about five or six minutes before the car struck me, and before that was on the street near the rail. I walked right on the walk and started to sweep there, and, after I worked five or six minutes on the street and started to step towards the track, I looked to the west, but did not see any car approaching. I didn't know the car was coming while I was working there. I looked first, but didn't see any car

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approaching. I did not hear any car, nor did I hear any gong. I had been working on the streets for five or six years sweeping, and before that I worked at the Upton Works. I always worked up to the time that I was injured, and earned $1.75 a day. My health was like oak before the injury, and my hearing was good. Before the accident, my hearing was very good, and up to that time, while working as a street sweeper, I could hear the bells of street cars. I could hear the sound of the gong if it had rung. I was 71 years of age on the 23d day of May; born in 1836."

Plaintiff was working on Lapeer avenue between Seventh and Eighth streets, which intersect the avenue at right angles, and at the time he was struck was about 80 feet west of the west line of Seventh street. Mr. Cruse, plaintiff's principal witness, testified that his attention was attracted to the car by the sound of the gong.

"The car was then between Eighth and Ninth streets. * * * I heard the gong ring at Eighth street. The car was then possibly 50 feet west of Eighth street. It was sounded three or four times—three or four quick taps. I didn't hear anything of the gong until the car was within a very few feet of Stenzhorn, possibly four feet. I have had experience on both electric and steam railways, and have had occasion to become familiar with the speed at which trains run. That car came down Lapeer avenue at least 10 miles an hour, and, after it struck Stenzhorn, went in the neighborhood of 40 feet. He was under the fender. The fender projects out over the rail. It would strike him on the calf of the leg from behind. She threw him under, and his head against the side of, the car on the south side. It jerked his feet under the fender until it came to the fender hanger. There is a bolt there, I think, with a split key. That split key caught his clothing, and made him fast there. The snow scraper in front of the wheels was directly behind his leg. When the car struck him, he fell to the pavement, his head fell out to the south, and the snow scraper, being behind him, kept him rolling along, his head bumping over the pavement. When the car stopped, it did not remain stationary, but was reversed and ran back, and he came back with it. He was still caught in the car with that split key. It jerked him back about 20 feet, when

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his clothes tore loose from the split key and left him lying on the rail. His head was about one foot from the rail, and his body, legs, and feet were directly across the south rail. The car continued backwards after clearing Stenzhorn, about, possibly, 10 feet, but then came forward again, but did not strike him. It came so close that the fender was directly over his legs. When the car struck Stenzhorn, the motorman reversed his car. When the car struck Stenzhorn, I ran to his assistance. At the time the car struck Stenzhorn, the motorman had reversed his motor, but the car kept on in an easterly direction until the momentum of the car had ceased by the backward motion of the motor. He still kept the car backing, and, as soon as the car would come to a stop, she would reverse right back, and run back this way quick. * * * I was motorman on the electric line for about 2½ years. Going at the rate of 10 miles an hour as this car was going it should be stopped in about 40 feet. That is done by applying the brakes, and in case of emergency reversing the power on the car to back motion. Reversing the car has the effect of revolving the wheels on backward motion. It starts the wheels revolving in the opposite direction to what it would be going forward. * * * There were quite a few teams and a number of people on the street near the intersection of Lapeer avenue and Seventh street. The teams made considerable noise in going over the pavement. * * *

"*Q.* Now, after you saw the car strike Mr. Stenzhorn, you say you ran toward him, you and Mr. McKinnon?

"*A.* Yes, sir.

"*Q.* What, if anything, did you say to the motorman? This was objected to by the defendant as immaterial and hearsay. (The objection was overruled, and defendant excepted.)

"*A.* As the motorman was approaching Stenzhorn the second time, I hollered to him, and asked him what he was trying to do—run over the man a second time? I also told him to put his reverse lever in the center of the controller, so that he couldn't use the power. If the lever was in the center, the current could not be turned on, and the car would have to remain stationary. * * * Well, when the motorman approached Eighth street, he sounded his gong. Mr. Stenzhorn was standing on the track on the south rail. There were also a number of teams and

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foot passengers, fire department teams, hook and ladder wagon. I don't know what else you call it, maybe a hose wagon, and a number of people passing the street, and I knew this would be. * * * Mr. Stenzhorn at this time was on the south rail. One step of three feet sideways would have taken him out of the way of the car, and, if he had stepped the other way, it would have been directly in front of it."

The declaration alleges in each count, either directly or by reference, that the plaintiff "was in plain sight of the motorman of said car as it approached plaintiff, for a distance of, to wit, 1,000 feet;" and it is undisputed that the car was visible for several hundred feet. Each count in the declaration alleges that the defendant "wantonly, recklessly, and wilfully disregarded its duties" specified in the declaration, but also contains an averment that the plaintiff was in the exercise of due care, and "was without negligence with respect to the cause of his said injuries." The second count averred that, after the car struck plaintiff—

"It became and was then and there the duty of said defendant to immediately stop said car, and to give aid, assistance, and attention to plaintiff and to hold said car stationary, and to render assistance in extricating plaintiff from under the fender of said car. Yet the said defendant wantonly, recklessly, and wilfully disregarded its duty by continuing to run its said car forward a distance of, to wit, 100 feet, after said car had struck plaintiff and knocked him to the pavement, as aforesaid, dragging plaintiff for said distance along and over the rough pavement. Defendant further wantonly, recklessly, and wilfully disregarded its duties by not holding said car stationary after it had stopped running forward, as aforesaid, and by reversing said car and running the same backward a distance of, to wit, 100 feet, again dragging plaintiff for said distance along and over the rough pavement."

The circuit judge directed a verdict for defendant so far as responsibility for the original striking was concerned, but submitted the case to the jury upon the theory that the evidence tended to show negligence in handling the

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car after plaintiff was struck, saying, among other things:

"I do not think the motorman by the exercise of ordinary care would have known when far enough away to have stopped his car that plaintiff was in a place of danger so long as, by a single step, plaintiff could have moved himself to a place of safety. Hence I do not think there is any opportunity of applying the law which permits the plaintiff to recover notwithstanding his own contributory negligence. And this is the theory set forth in the declaration, and the theory upon which this case has been tried, and the theory of the requests to charge which have been presented to the court. In this case the motorman was not running his car at any unusual rate of speed when the car passed over Eighth street moving to the east. And the motorman was justified in acting on the assumption that the plaintiff would step off the track and escape injury. Hence I do not consider the exact position of the plaintiff on the pavement or on the track or the fact as to whether or not the gong was rung after the car passed Eighth street, as controlling. The theory I have outlined is plaintiff's theory of the case. And I now direct you that he could not recover because he was struck, on this theory. And in so acting I rely on the Michigan case of *Lyons* v. *Railway Co.*, 115 Mich. 114 (73 N. W. 139), and the statement contained in *Kotila* v. *Railway Co.*, 134 Mich. 315 (96 N. W. 437).

"However, in the second count in plaintiff's declaration is found another and separate charge of negligence. It is charged that the defendant's motorman was negligent in backing the car after the plaintiff was struck, and after the car stopped. You will remember that the testimony of some of the witnesses shows that after plaintiff was struck, and after the car stopped, it backed; there being some difference in the testimony of the witnesses regarding how far the car backed up. After stopping the car, it was the duty of the defendant's motorman to do all he could do to prevent any further injury to plaintiff. If he failed to do all that a reasonably prudent man would have done under all the circumstances, taking into consideration the extremity, the probability of excitement, and all the surrounding conditions, the motorman may be charged with negligence for which the defendant is responsible. If he did all that a reasonably prudent man

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would do under the circumstances, the railway company, defendant, cannot be charged with negligence by reason of any act of the motorman. (To which the defendant excepted.)

"There is no foundation in the evidence for the charge of any wilful, wanton, or reckless act against the motorman in backing the car."

The jury found a verdict for plaintiff, and defendant has removed the record to this court for review.

Although the ruling in favor of defendant as to its responsibility for the original striking is not technically before us, the point is discussed in the briefs of counsel for both parties, and is so intimately connected with the second branch of the case that we deem it proper to consider it. Certain of plaintiff's witnesses testified that there was noise at the point in question which might interfere with hearing the car. His fellow sweeper, working about seven yards away, testified:

"Stenzhorn had been sweeping on the track about two or three minutes before he was hurt. I did not see the car before it struck him. I was minding my work, and was not watching the car. I can't swear that I heard the car coming.

"*Q.* Was there any gong sounded before it struck?

"*A.* No; I heard no bell ringing at all. My hearing is pretty good. I didn't hear any noise about there at the time. There was no sound or anything that would prevent me hearing a gong if one had been sounded. By all means I could hear a gong on a street car. * * * I was working along there doing my sweeping, and not paying any attention to the car. I didn't even know it was coming until it struck him. I never took any notice. The first thing that called my attention to the car was when I saw the fellows running towards Mr. Stenzhorn, and I did not know anything about the car before that."

Another of plaintiff's witnesses testified:

"After I first saw Mr. Stenzhorn, I heard no bell nor no gong. My hearing is good so that I can hear gongs on street cars when they are rung on the streets. I heard no noises sufficient to drown the sound of the gong if one had been rung. I heard no sound. I heard noth-

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ing at all. There was no unusual noise there at the time that I took any notice of."

The conductor, the motorman, and the only passenger on the car testified to the giving of warning signals. Assuming that the testimony of plaintiff's witnesses that they heard no signals raised a question of fact for the jury, we are of the opinion that the plaintiff was guilty of contributory negligence in working upon the track in such a position as to deprive him of the use of his vision, and in relying solely upon his sense of hearing. If there was noise and confusion, as testified by some of his witnesses, it was not prudent for him to rely solely upon his hearing. If there was no noise to prevent his hearing and his hearing was very good, as he testified, it is inconceivable that he, working over the rail, should not have heard the approaching car, if he was listening for it. There is no evidence in this record that he was listening or was in the habit of listening for approaching cars, although he testified:

"I cannot tell how often the cars run up and down Lapeer avenue. I don't keep track of them. I haven't time when I am working. I always watch the cars, watch them so they wouldn't run over me and keep my eye on them, but I can't tell how often they went back and forth. I started to work that morning at 7 o'clock. * * * I commenced to work on Lapeer avenue on the morning that I was hurt at Eighth street and work west as far as Fifteenth or Sixteenth street. Then I went on Water street and was there for some time, and then went on Lapeer avenue and worked east from Eighth street. Cars passed by me both on Lapeer avenue and Water street while I was working there. I don't know how often. I didn't notice it particularly."

The conclusion is irresistible from his testimony and the surrounding facts and circumstances that, like his fellow workman, his mind was wholly occupied with his work, and he was not paying any attention to the car. We are therefore of the opinion that the ruling of the circuit judge was correct on this branch, even if we assume

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that the declaration did not admit the plaintiff's negligence and predicate a recovery upon the negligence of defendant after the discovery of plaintiff's negligence. In any phase of the case we think it is ruled upon this branch by the cases cited by the circuit judge. Considering the case on this branch as one involving a charge of ordinary negligence, a recovery is barred by plaintiff's contributory negligence. Considering that a recovery is sought for the negligence of defendant as the proximate cause of the accident after discovering plaintiff's precedent negligence, there was no evidence to sustain such recovery under the rule of *Daly* v. *Railway Co.*, 105 Mich. 193 (63 N. W. 73); *Lyons* v. *Railway Co.*, 115 Mich. 114 (73 N. W. 139).

Did the court err in submitting to the jury the question whether defendant's motorman was negligent in backing the car after the plaintiff was struck? The answer to this question must depend, in our opinion, upon whether such backing of the car was due to a new act of the motorman after the stopping of the car and independent of the original attempts to stop the car and avoid the accident. The declaration charges an independent act of the motorman in wantonly, recklessly, and wilfully disregarding his duty "by not holding said car stationary after it had stopped running forward as aforesaid, and by reversing said car and running the same backward, etc." The proofs do not sustain this allegation of the declaration, but make it manifest that whatever negligent acts were committed by the motorman were committed in endeavoring to stop the car to avoid striking plaintiff. The car was reversed before striking plaintiff. It was not reversed after it had stopped. It was all one transaction, and cannot be split up into two separate branches. If defendant was guilty of any negligence in permitting the reverse action to continue in operation after the forward motion of the car was overcome, it was part of the original negligence and not an independent ground for recovery. The doctrine of discovered negligence does not apply to this branch of the

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case under the declaration and proofs. *Labarge* v. *Railroad Co.*, 134 Mich. 139 (95 N. W. 1073); *Buxton* v. *Ainsworth*, 138 Mich. 532 (101 N. W. 817).

We are also of the opinion that the court erred in permitting Cruse to testify to what he said to the motorman after the injuries to plaintiff were complete.

Judgment reversed, and new trial granted.

GRANT, MOORE, MCALVAY, and BROOKE, JJ., concurred.

In re RADFORD.

1. ATTORNEY AND CLIENT — DISBARMENT PROCEEDINGS — WORDS AND PHRASES—ACTION AT LAW.
   Proceedings for disbarment are the exercise on the part of the court of its inherent right and power to preserve the orderly administration of justice, and are not actions at law.

2. SAME.
   The conduct of every officer of a court is always the subject of supervision and inquiry on the part of the court.

3. CERTIORARI — DISBARMENT PROCEEDINGS — APPEAL AND ERROR — DEMURRER.
   Certiorari does not lie, as in actions at law, to review the order of a circuit court in disbarment proceedings overruling a demurrer to the charges filed against an attorney, until after a final determination. Act No. 310, Pub. Acts 1905.

4. SAME—ATTORNEY AND CLIENT—SUPREME COURT.
   The Supreme Court has exercised general supervisory jurisdiction in such cases, but has never assumed exclusive jurisdiction.

Petition by George W. Radford for a writ of certiorari

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to review an order overruling a demurrer to a petition for his disbarment as an attorney at law. Submitted October 1, 1909. (Calendar No. 23,804.) Writ denied December 10, 1909.

Thomas A. E. Weadock, for petitioner.

Charles T. Wilkins and *Charles W. Casgrain, amici curiæ.*

McALVAY, J. Pending proceedings before the circuit court for Wayne county for the disbarment of petitioner, he applies to this court for a writ of certiorari to review the action of such court in overruling his demurrer to the charges filed against him. Upon the filing of the petition in this court, briefs were requested from both parties as to whether the issuance of the writ of certiorari was the proper practice at this stage of disbarment proceedings. The legislature by Act No. 310, Pub. Acts 1905, made a change in the practice, as to a review of certain questions by this court on certiorari, as follows:

"Whenever in any action at law in a circuit court * * * the issue raised on a demurrer * * * shall be decided adversely to the party filing such * * * demurrer * * * the decision may be reviewed by writ of certiorari forthwith."

Before this enactment, the practice in this State, with few, if any, exceptions, had been not to allow a writ of certiorari before a final decision in a case by an inferior court.

It is urged by petitioner that proceedings of this kind are fairly within the statute, and are actions at law, and therefore that he is entitled to this writ under the provisions of the statute; and, further, if not included within the terms of the statute, in these proceedings such a case is made that the court should interfere to prevent great injury which may befall petitioner if denied. It is also urged that the practice in such proceedings has never been fixed by this court, and also that the circumstances of this

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case warrant this court, in the fair exercise of its discretion, to issue the writ for the purpose of at this time determining the questions of law presented. Of these contentions the first must be determined against relator. In no sense can such proceedings be called an action at law. Like contempt proceedings, proceedings for disbarment are the exercise on the part of a court of its inherent right and power to preserve the orderly administration of justice. The conduct of every officer of a court is always the subject of supervision and inquiry on the part of the court. This court has held that proceedings for contempt were not within the statute. While contempt proceedings are regulatory of the individual conduct of all parties in the presence of the court and elsewhere to preserve due respect for it and to prevent interference with the orderly course of business, and preserve its dignity, yet such proceedings are necessarily the exercise of inherent power and right of self-preservation. So proceedings for disbarment, although not in the nature of police regulations, are taken by courts to protect the administration of justice, and to guard the interests of litigants against the rapacity or cupidity of officers of the court who alone are authorized to present their disputes before the court. Incidentally such proceedings are beneficial to the profession of the law by eliminating unworthy members; but primarily to preserve from contamination the administration of justice.

We do not think the cases passed upon by this court, and cited by petitioner, where under the statute invoked certiorari has been held the proper remedy, are of any cogency in support of relator's claim. There was apparently little dispute upon the question of remedy. These cases arose in ordinary actions at law upon motions to quash writs or declarations upon jurisdictional grounds, demurrers, pleas to the jurisdiction, or other dilatory pleas—all strictly within the provisions of the statute. There is no settled practice in disbarment proceedings in this State. Eight cases only are reported. Seven of these

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were instituted in this court. The earliest case (*In re Mills*, 1 Mich. 392) was before this court upon questions of law reserved by the circuit judge of Kent county under a statute at that time in force allowing such practice. Under such practice, the court passed upon certain questions of law and remanded a case for the guidance of the trial court. Later that statute was declared unconstitutional, and the case furnishes us no precedent. None of the other cases shows the course of procedure, except *In re Shepard*, 109 Mich. 631 (67 N. W. 971), begun in Hillsdale circuit court, in which a motion was made to dismiss the application on jurisdictional grounds, and after its denial an answer was filed, proofs taken, and disbarment adjudged. The case was then reviewed by this court on certiorari and affirmed. This court has exercised general supervisory jurisdiction in all these cases, but has never assumed exclusive jurisdiction. There would appear to be no reason why proceedings of this kind should be commenced in this court, except where the conduct complained of is directly connected with cases before the court. The time of the court would be unnecessarily taken up with the hearings of these issues of fact, which should usually be heard where they arise. The better practice would be to have the trial courts try and determine these matters, leaving to the persons disciplined a review by this court of any questions of law raised. There is no reason why the responsibility of regulating the conduct of the attorneys in the several circuits should be shifted upon this court. These proceedings were begun in the proper forum. As to questions raised which go to the merits, we at this time express no opinion, nor do we assume the promulgation of any rules of practice relative to these proceedings to be necessary.

So far there appears to have been no difficulty in getting the ear of this court to review any questions involved in such proceeding. It does not appear since the *Mills Case* that any have been brought here for review until final determination in the circuit court. We approve this

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practice, and refuse to hear these matters in any other manner. Any other method we think would tend to hinder and delay the prompt disposition of a class of proceedings which should be prosecuted with all due dispatch.

The writ of certiorari is denied, and the matter will proceed in the court below until finally determined.

BLAIR, C. J., and GRANT, MONTGOMERY, and BROOKE, JJ., concurred.

SCOVEL *v.* CITY OF DETROIT.

1. EVIDENCE—DEEDS—SPECIAL ASSESSMENTS—PAROL EVIDENCE—CONSIDERATION—MUNICIPAL CORPORATIONS.

   Testimony tending to show that property was deeded to a municipal corporation for a boulevard, under an agreement with the members of the municipal boulevard commission that special assessments were not to be made for improvements, is competent to show the true consideration.

2. MUNICIPAL CORPORATIONS—TAXATION—SPECIAL ASSESSMENTS—SIDEWALK IMPROVEMENTS.

   The conveyance to the city of Detroit of property for a boulevard, by a deed referring to Act No. 888, Local Acts 1889, creates an implied contract to raise funds for improvements by general taxation as provided in the act, and is not affected by its repeal under a proviso that rights acquired under the repealed law should not be impaired.

Appeal from Wayne; Mandell, J. Submitted October 14, 1909. (Docket No. 35.) Decided December 10, 1909.

Bill by Massie W. Scovel and another against the city of Detroit and others to restrain a special assessment for

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the construction of sidewalks. From a decree dismissing the bill complainants appeal. Reversed, and decree entered for complainants.

James H. McDonald and *Lloyd L. Axford*, for complainants.

Walter Barlow (*P. J. M. Hally*, of counsel), for defendants.

BLAIR, C. J. On January 28, 1887, Daniel J. Scovel and Jane M. Scovel, his wife, conveyed by warranty deeds two strips of land, one strip by each deed, to the city of Detroit for the use of a public boulevard, as contemplated by Act No. 374 of the Local Acts of 1879. The following reservation by the grantors is contained in each deed:

"Said strip of land is conveyed only for the use of a public boulevard as contemplated by Act No. 374, passed by the legislature of Michigan in 1879, and if discontinued by law, shall revert to the parties of the first part, their heirs and assigns, and they may enter upon and possess the same, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining."

The complainants are heirs at law and assignees of said Daniel W. Scovel and Jane M. Scovel, his wife, and are the owners in fee simple of several lots abutting the strips of land so conveyed by said Daniel J. Scovel and Jane M. Scovel, his wife, to said city for boulevard purposes. The commissioner of parks and boulevards caused notice to be served upon them to build, at their own expense, a cement sidewalk upon a part of said boulevard, in front of their several lots, and they refused to build said sidewalk, claiming that the same was an improvement on said boulevard and should be paid for by public taxation. On their refusal to construct said sidewalk, the said commissioner of parks and boulevards constructed the same. The cost and expense thereof, $326.31, has been assessed upon their said lots; and the city treasurer is threatening to sell

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said lots for nonpayment of said special assessments thereon. The bill was filed to set aside said special assessments, and to restrain the city treasurer from selling said lots for the purpose of collecting said assessments. On the hearing of the case in the court below a decree was entered dismissing the bill, and the complainants have appealed therefrom to this court.

The commissioner constructed the sidewalk under the authority of Detroit City Charter (1904), § 571. Counsel for complainants contend that the acceptance of the deeds, specifically referring to the statute, which prohibited special assessments of abutting property for improving the boulevard, created a contract that, in consideration of such deeds, grantors should not be subjected to such assessments. This contention is denied by counsel for defendants, who insist that the question has been disposed of in their favor in the case of *Turner* v. *City of Detroit*, 104 Mich. 326 (62 N. W. 405). James D. Scovel, a son of Daniel J. Scovel, testified, under objection, that he was one of the witnesses to the deeds, and that at the time they were executed he was familiar with the proceedings for the establishment of the boulevard; that he acted for his father in that matter, and personally delivered the deeds; that the talk then was that it was considered there would be no assessments of abutting property; that the abutting property would stand no part of the cost of construction, and under those conditions the deeds were given; that his father expected to derive a benefit to his property on account of the nature of that thoroughfare, and that that was the chief feature that led him to do as he did do; that it would enhance the value of his property along the boulevard frontage; that he talked with Mr. Chapoton, Mr. McGrath, and Mr. Langley, who were the members of the board of public works, and also boulevard commissioners at that time, in regard to making the dedication to the city for boulevard purposes; that he informed his father and mother of the substance of his un-

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derstanding with these gentlemen, and that after the matter was all understood by Mr. Chapoton, Mr. McGrath, Mr. Langley, and his father and mother and himself, the two deeds were executed by his father and mother in the form that they show here. We think the testimony was competent, as showing the actual consideration of the deed. *Long* v. *Mayor, etc., of Battle Creek*, 39 Mich. 323 (33 Am. Rep. 384); *Strohauer* v. *Voltz*, 42 Mich. 444 (4 N. W. 161); *Breitenwischer* v. *Clough*, 111 Mich. 6, 116 Mich. 340 (69 N. W. 88, 66 Am. St. Rep. 372, 74 N. W. 507); *Ford* v. *Savage*, 111 Mich. 144 (69 N. W. 240); *Eckler* v. *Alden*, 125 Mich. 215 (84 N. W. 141). *Turner* v. *City of Detroit, supra*, does not rule this case. It appears from the opinion in that case that the complainant alleged in her bill:

"That her land was condemned for the use of the boulevard in 1890, under Act No. 388, Local Acts 1889. Her counsel in their brief refer to the original boulevard act (No. 374, Local Acts 1879). This act was expressly repealed by the act of 1889. Complainant's rights must therefore be determined by the later act."

Section 16 of said Act No. 374 is as follows:

"SEC. 16. The city of Detroit may annually raise and appropriate funds for the uses and purposes of the said boulevard, but shall raise the same by taxation only, and after approval of the board of estimates, and in the manner provided by law for raising funds for the general purposes of the said city. The funds raised by the city of Detroit for the uses and purposes of the said boulevard shall remain with the city treasurer of the said city, and shall be kept by him in a separate fund, to be known and designated as the 'boulevard fund,' and no moneys shall be drawn therefrom except on the warrant of the controller of said city."

Section 17 makes a similar provision with reference to the townships of Hamtramck, Greenfield, and Springwells. The limitation of the raising of funds, "for the uses and purposes of the boulevards," "by taxation *only*, and after approval of the board of estimates, and in the

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manner provided by law for raising funds for the general purposes of said city," does not appear in said Act No. 388. The language of the deeds that "said strip of land is conveyed for the use of *a public boulevard as contemplated by Act No. 374*," etc., should be construed, in the light of the surrounding circumstances, as referring to a boulevard to be improved and maintained by general taxation only. Under this construction the acceptance of the deeds by the city raised an implied contract, at least, not to levy special assessments upon the grantor's abutting property. The agreement was one which the city had power to make, and which it ought to keep. *Coit* v. *City of Grand Rapids*, 115 Mich. 493 (73 N. W. 811). The section (30) of Act No. 388, Local Acts 1889, which repealed Act No. 374, Local Acts 1879, expressly "Provided, that such repeal shall not impair or affect any acts done or rights accrued or acquired under said act."

The decree is reversed, and a decree may be entered in accordance with this opinion, with costs of both courts to complainants.

GRANT, MOORE, MCALVAY, and BROOKE, JJ., concurred.

SWANTEK *v.* JARMOSZKA.

JUSTICES OF THE PEACE—APPEAL—CERTIORARI AS EVIDENCE.

After the removal of a cause by appeal from justice's to circuit court the justice's return to a writ of certiorari is of no effect and is incompetent as evidence in aid of a motion to dismiss the appeal. 1 Comp. Laws, § 918.

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Error to Kent; McDonald, J. Submitted October 15, 1909. (Docket No. 99.) Decided December 10, 1909.

Assumpsit in justice's court by Peter Swantek against Stephen Jarmoszka for work and labor. Plaintiff recovered judgment for an insufficient amount, and appealed to the circuit court. The defendant subsequently took out certiorari upon the justice's judgment. An order granting a motion to dismiss the appeal is reviewed by plaintiff on writ of error. Reversed.

George Hollway, for appellant.

Hatch & Raymond, for appellee.

MCALVAY, J. Plaintiff on May 11, 1908, recovered a judgment in justice's court in the city of Grand Rapids against defendant in an action in assumpsit for $160 damages and costs of suit. This amount being much less than the amount claimed by plaintiff, he in due time took a general appeal to the circuit court for Kent county. The return to this appeal was taken May 16, and filed May 19, 1908. Steps taken by him in making this appeal, and the return by the justice, appear to be regular in all respects. Afterwards defendant took steps to remove the case to the said circuit court by writ of certiorari. The return to this writ was made by the justice on June 30, 1908. Plaintiff's appeal was duly noticed and regularly set for trial upon the circuit court jury calendar for the September term following. At that term defendant moved to dismiss the appeal for the reasons:

(*a*) That the judgment was rendered by the justice when without the limits of the city of Grand Rapids and while in Benzie county, sending a memorandum of said judgment by mail to the clerk of his court.

(*b*) That he so decided it on May 11, 1908, which was the third day after the trial, when he had announced that he would take four days in which to decide the case.

These are all the objections made to the regularity of

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the proceedings, or to the judgment. This motion was founded upon the return of the justice to the writ of certiorari. Upon the hearing of this motion the case was stricken from the calendar on motion of defendant's attorneys. The case was again noticed for trial by plaintiff for the December term of said court, and defendant made the same motion to dismiss the appeal upon the same grounds. The motion was granted, and a judgment entered accordingly. Plaintiff by writ of error asks a review of the case upon errors assigned.

The contention is that the court erred in considering the return in the certiorari case upon the motion to dismiss, and in dismissing the appeal on account of statements contained in such return. As far as this record shows, no hearing has ever been had in the certiorari case. The only use which has been made of the return of the justice in it has been for the purposes of the motion to dismiss the appeal of plaintiff. The situation is a novel one. We consider the error assigned upon exceptions taken broad enough to go to the competency of the return in the certiorari case as evidence. The appeal had been taken regularly, and the return made and filed in the circuit court, before the proceedings for certiorari were taken. It is well settled that after an appeal is perfected the justice has no further jurisdiction over the case. The statute reads:

"On filing the return of the justice the circuit court shall become possessed of the cause the same as if it had been originally commenced in said appellate court, subject to the same rules and regulations." Section 918, 1 Comp. Laws.

Therefore after this appeal the justice had no jurisdiction of the case. His return to the writ of certiorari was of no valid force or effect. The action of the court in dismissing the case, having been founded solely upon the recitals contained in the return of the justice to the writ of certiorari, was erroneous.

It is not necessary to discuss other matters argued in

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the briefs of the parties. No other relevant or material questions are presented.

The judgment is reversed and set aside, and the case is remanded to the circuit court for further proceedings.

BLAIR, C. J., and GRANT, MOORE, and BROOKE, JJ., concurred.

CRYSTAL ICE CO. *v.* UNITED SURETY CO.

1. INSURANCE—GUARANTY AND INDEMNITY BONDS—PRINCIPAL AND SURETY.

   It is not a defense to an action on a bond which indemnified an employer against the default of a collector, and which provided for notice to the surety company by registered letter, that the registered letter was not sent as required by the contract, where actual notice was promptly given of the embezzlement to the State agent of the surety, who promptly notified his principal.

2. SAME—CONTRACTS—WAIVER—BREACH.

   The employer was justified in acting on the advice of the State agent and retaining the collector in his employ, notwithstanding a proviso in the contract against such retention after a default, where it appeared that the advice given was known to the surety and it forwarded blank proofs of loss and received the proofs without objection.

3. SAME—NATURE OF BOND—LIABILITY.

   A bond for indemnity against loss through the default of an employé makes the surety an insurer in all essential particulars and subject to the same rules as fire and life insurance companies.

4. SAME—PRINCIPAL AND AGENT—GENERAL AGENCY.

   An agent who takes a risk and issues a policy of insurance is a general agent.

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5. SAME—DEFENSES—EVIDENCE.

Evidence that money had been taken by the employé, is insufficient to establish as a defense to an action on the indemnity contract that his accounts had not been examined weekly, as required by the contract.

Error to Wayne; Murfin, J. Submitted October 22, 1909. (Docket No. 175.) Decided December 10, 1909.

Debt by the Crystal Ice Company, Limited, against the United Surety Company for the amount of a bond. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Frank C. Cook, for appellant.

Thomas Hislop, for appellee.

MCALVAY, J. The action in this case was brought by plaintiff on a surety bond executed by defendant company to plaintiff June 1, 1906, insuring plaintiff, for the term of one year, to the amount of $500, against loss sustained by the larceny or embezzlement of a certain employé while in plaintiff's employ as a collector The surety bond was renewed for another year by a renewal certificate. On December 24, 1907, while this bond continued in force, the employé confessed to Mr. Osborne, secretary of plaintiff company, that he had not returned money of plaintiff collected by him, to the amount of $96.98. The secretary at once went to Mr. Parker, who was State agent representing defendant, and reported what the employé had told him. He asked Mr. Parker what he should do about it, and whether he should continue the employé at work. He told him that he did not know, and could not tell from the nature of the business, how much was missing; that he only knew the amount confessed to him. Mr. Parker told him that he would report to the company, and that he would better keep the man at work until he heard from the company, as it would be but a few days. The secretary followed these instructions. He continued to find

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more money, which had been paid to this collector, missing, and reported that fact to Mr. Parker from day to day and asked for instructions. Mr. Parker received a letter from the company written by its attorney, which was shown to Mr. Osborne. It was dated December 26, 1907, and reads as follows:

"We have your favor of the 24th inst. in regard to bond 3477 executed on behalf of Edward V. Joy and note contents. We will await further advices in this matter."

After this Mr. Osborne called upon Mr. Parker every day or two, reporting further accounts missing, and asked for instructions as to what to do. He was told by Mr. Parker that he had received a letter from the company saying that further instructions would be given. He asked if there was anything more he should do in the matter, and was told that the letter was expected every day and to await further instructions. He was also told, as soon as he knew the full amount of the loss, to send it in. This was done by Mr. Osborne. It does not appear from the record that the promised letter and instructions ever came. Joy continued to work for plaintiff until February 12, 1908. On February 15, 1908, plaintiff wrote to defendant company at Baltimore, Md., sending a list of all accounts collected by Joy and not accounted for, giving name and residence of customer, date of collection, where possible, and the amount. This letter also contained statements relative to the case which are not of sufficient importance to quote. This letter was answered by defendant through its attorney, February 18, 1908, as follows:

"*Gentlemen:* We have your favor of the 15th inst. inclosing itemized claim of your company against this company under the bond of Edward Joy, No. 3477, and note contents. In reply we beg to advise that we have written our agent Mr. Edw. H. Parker in your city in connection therewith, who will in all probability take the case up with you in the next few days.

"Yours very truly,

"H. E. MILES, Attorney."

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On February 28, 1908, Mr. Parker wrote Mr. Osborne on the home office letter paper of defendant company, as follows:

"DETROIT MICH., Feb. 28, 1908.

"Mr. OSBORNE,

"CRYSTAL ICE COMPANY, Detroit.

"*Dear Sir:* Inclosed herewith please find blank form of proof of loss, which I would ask you to kindly fill out and execute and return to me at your earliest convenience, and oblige.

"Yours truly,

"UNITED SURETY COMPANY,

"EDW. H. PARKER, State Agent."

Proofs of loss were accordingly made upon this blank, on March 3, 1908, and sworn to before Agent Parker. Defendant did not ask for other or further proofs. The record shows some other letters between the parties and their attorneys not material to the case. On April 9, 1908, defendant wrote plaintiff denying all liability in the premises for the reasons:

(1) That the requirement that the employé's accounts were to be examined weekly had not been followed.

(2) That the employé had been continued in plaintiff's employment after the knowledge of peculations, thereby condoning the offense, which was prohibited by the terms of the bond.

(3) Neglect to immediately notify the company by registered letter of the discovery of any act which may be the basis of a claim under the bond, as by its terms required.

The foregoing statement contains, in effect, all of the material evidence in the case. It has been given fully for the reason that defendant offered no evidence except some exhibits (letters) introduced on cross-examination. The substance of those considered material is given.

Both parties at the close of the case requested an instructed verdict. These motions were denied, and the case was submitted to the jury upon the question of fact as to whether Joy had embezzled the money of plaintiff to the amount of $169.04, which had been agreed upon as the

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amount of plaintiff's claim. The jury returned a verdict for plaintiff for that amount, and a judgment was entered. Defendant brings the case before this court for review upon a writ of error, claiming that the court erred in denying its motion for an instructed verdict, and in refusing defendant's requests, based upon the reasons denying liability given in the letter last above set forth.

In this case it appears without dispute that Mr. Parker, who acted for defendant when this bond was procured, was the State agent of defendant. He was promptly informed of the employé's confession of misconduct, and as promptly notified defendant company. Two days later defendant acknowledged receipt of such notice, stating that they would await further advices. Therefore defendant was notified immediately of acts which would be the basis of a claim under the bond.

In the matter of continuing the employé at work, plaintiff acted upon the instructions of defendant's State agent. There is no evidence which shows that the accounts had not been examined weekly up to the time of plaintiff's first knowledge of the employé's misconduct, except by inference from the fact that money had been taken by him. This could have been readily done without plaintiff's knowledge by a false statement of money received, or by giving a receipt without crediting an account. All that occurred after the discovery was done while plaintiff was acting under instructions from Mr. Parker, whose knowledge was the knowledge of the defendant, and whose act in giving instructions to plaintiff to continue the employé at work was the act of defendant.

Defendant is in all essential particulars an insurer. 32 Cyc. p. 307, and cases cited. The same rules, as to the authority of general agents of such companies, should be applied, as are applied to fire and life insurance companies. It is settled law that the agent who takes a risk and issues a policy is a general agent for the insurance company. Mr. Parker acted as agent in taking this insurance, and also was the State agent of defendant company. Defend-

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ant company had further knowledge of plaintiff's claim than through Mr. Parker. Plaintiff sent a full statement of its entire claim against defendant, and also many of the facts in the case, by letter direct to its home office, February 15, 1908. The answer of February 18, 1908, is already given in full. The matter was referred to Agent Parker, who would take the case up in a few days. He did this on February 28th following, sending blank proofs of loss for execution and return, acting as State agent for defendant. At this time defendant knew: (*a*) Of the employé's defalcation by information given immediately; (*b*) that Joy had remained in plaintiff's employ on its agent's advice; (*c*) the facts upon which it claims weekly accountings were not had with Joy.

The proofs of loss were sworn to before Mr. Parker and delivered to him March 3, 1908, and defendant delayed any denial of liability until April 9, 1908. We do not think that, under the evidence in this case, the three defenses urged were available to defendant on account of its own knowledge of the facts, and the knowledge of the agent, Parker, and his instructions to plaintiff, and also on account of the fact that, if any of such defenses could have been interposed, all these matters were waived by furnishing the proofs of loss and accepting the same without objection (*Burnham* v. *Casualty Co.*, 117 Mich. 142 (75 N. W. 445).

The errors assigned upon the admission of certain evidence need not be discussed. The court took every question of fact from the jury, except whether the employé had embezzled the amount claimed. The evidence objected to related to other questions.

The judgment is affirmed.

GRANT, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

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In re BENDER'S ESTATE.

APPEAL OF LOOK.

APPEAL AND ERROR — CONTENTS OF RECORD — MOTION FOR NEW TRIAL—OPINION AND EXCEPTIONS NECESSARY.

In the absence of a request to the trial court to give its reasons in writing for the refusal of a new trial, no reasons appearing in the record and no exceptions being taken to the refusal, the Supreme Court will not review the action of the lower court in denying a motion for a new trial.

Error to Wayne; Mandell, J. Submitted October 22, 1909. (Docket No. 152.) Decided December 10, 1909.

William Look presented his final account as special administrator of the estate of Joseph Bender, deceased. From the account as allowed in the probate court, said administrator appealed to the circuit court. A judgment affirming the order of the probate court is reviewed by said administrator on writ of error. Affirmed.

Charles Flowers, for appellant.

Herbert C. Munro and *Arthur E. Schreiter*, for appellee.

MCALVAY, J. The administrator appealed from an order of the probate court of Wayne county, on the allowance of his final account, to the circuit court. When the case was set for hearing before the court, a jury having been expressly waived, the administrator asked for a continuance, on the ground of the unexpected absence of his attorney, who was also a material witness, and of which absence he had first learned on that date. The request was denied by the court making the following statement:

"*The Court:* Let it appear of record that under the rules adopted by the bench with reference to the arrange-

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ment of the business of this court, this division of the court has nothing to do with the matters of application for continuance, and has nothing to do but to try the cases assigned to it. That application, according to my suggestion, was made to the presiding judge, Judge Donovan, for continuance, and that application was denied. I will proceed with the hearing of the case."

Appellant excepted to the denial of the continuance. The court proceeded with the hearing, and allowed the account in favor of the estate at $973.90, being the same as allowed by the probate court, with interest. Later the administrator made a motion for a new trial on the ground that the court erred in denying the continuance asked for, and also in not allowing certain items of his account. This motion was denied.

The case is here upon writ of error. At the time of the trial a judgment was not entered. It was formally entered a long time afterwards. The only error assigned is upon the denial of this motion of the administrator for a new trial. By some oversight neither this judgment nor the order denying this motion for a new trial was printed in the record. A copy of the order is furnished in appellant's reply brief, but we do not find in the record a request to the court to file reasons in writing for denying this motion. No reasons are given by the court in the record, although the record shows exceptions taken to the action of the court in denying the motion. This court has repeatedly held that under such circumstances the action of the circuit judge in refusing to grant a new trial will not be reviewed. Among these decisions reference is had to the following: *Griffin* v. *McKnight*, 116 Mich. 470 (74 N. W. 650); *Stevenson* v. *Railway Co.*, 118 Mich. 653 (77 N. W. 247); *Gillett* v. *Burns*, 131 Mich. 617 (92 N. W. 104), and other cases there cited.

The judgment is affirmed.

GRANT, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

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PIERSON *v.* ILLINOIS CENTRAL RAILROAD CO.

1. DAMAGES—TRESPASS—RAILROADS—CARRIERS OF PASSENGERS—EJECTING PASSENGERS.
   In an action for damages based upon a wrongful expulsion from a train of the defendant, in which the declaration did not put in issue the question of damages for the value of plaintiff's ticket, testimony as to the amount paid for the ticket is properly excluded.
2. EVIDENCE—SUBSEQUENT ACTS—RES GESTÆ.
   Testimony concerning a conversation held between the plaintiff and defendant's conductor three hours after the plaintiff was ejected from defendant's train is inadmissible under a declaration which counts only on the ejection.
3. SAME—CONCLUSIONS—OPINION EVIDENCE.
   A statement by a witness that plaintiff groaned involuntarily is an inadmissible conclusion.
4. SAME—PRIVILEGED COMMUNICATIONS—HUSBAND AND WIFE.
   A divorced wife may not testify to diseases of her former husband of which she learned by communications during the marriage relation; the evidence being excluded as privileged under 3 Comp. Laws, § 10213
5. SAME—SAVING QUESTIONS FOR REVIEW.
   An objection that the testimony should be struck out, because the parties were husband and wife at the time covered by the testimony, sufficiently apprised the trial judge of the reason relied on.

Error to Calhoun; North, J. Submitted October 12, 1909. (Docket No. 54.) Decided December 10, 1909.

Case by John A. Pierson against the Illinois Central Railroad Company for a wrongful ejection from defendant's train. A judgment for defendant is reviewed by plaintiff on writ of error. Reversed.

Hatch & Anderson, for appellant.

Arthur B. Williams, for appellee.

BROOKE, J. This is the second time this case has been

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before this court for consideration. The first decision is reported in 149 Mich. 167 (112 N. W. 923), where a sufficient statement of fact will be found. The last trial resulted in a verdict and judgment for defendant. Plaintiff brings the case here on writ of error.

Error is assigned by the plaintiff upon the refusal of the court to permit him to testify as to what he paid for the ticket; it being claimed by his counsel that, in any event, plaintiff should have recovered a judgment for the value of the ticket upon which transportation was refused. This claim cannot be maintained. The action is brought solely to recover damages for the alleged wrongful expulsion from defendant's train. Plaintiff has, no doubt, a right of action against defendant for the value of the unused portion of the ticket; but he has not chosen to put that matter in issue in this suit.

Plaintiff sought to give evidence of a conversation between himself and N. A. Ross (defendant's conductor), held at Ft. Dodge, about three hours after leaving Council Bluffs, the point at which he had been ejected from defendant's train. This same testimony was offered at the former trial. It was received, but afterwards stricken out. In considering the question this court said: "It was received, but was stricken out as soon as its immateriality developed." The defendant was there claiming that the taking of the testimony, and subsequently striking it out, constituted error. The plaintiff at that hearing, having recovered a judgment below, was interested only in defending the action of the court upon which the judgment was predicated. He now urges that the testimony was admissible. An examination of the declaration shows that the plaintiff counts only upon the alleged wrongful acts of defendant committed at Council Bluffs. The testimony was properly excluded.

Error is assigned upon the action of the court in striking out the evidence of Gertrude Anderson:

"My father did not complain to me of suffering; but

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I heard him groaning involuntarily, which continued some time after, till he left for Mt. Clemens."

There is no doubt that exclamations of pain may be proven where they are the natural and ordinary accompaniments and expressions of suffering. *O'Dea* v. *Railroad Co.*, 142 Mich. 265 (105 N. W. 746), and cases cited. But the witness had no means of knowing, and therefore could not properly testify, that the groaning was involuntary. No error was committed in striking out the testimony.

Plaintiff's 11th assignment of error is as follows:

"The court erred in permitting Gertrude Wilson, the divorced wife of plaintiff, to testify to confidential communications, communicated to her by plaintiff, while the marriage relation existed, and in refusing to strike out such testimony, upon motion made by one of plaintiff's attorneys, Mr. Salisbury, for that purpose; and the court also erred in permitting Gertrude Wilson to testify that, when she was living with plaintiff, as his wife, plaintiff was troubled with his back and constipation, that he often used plasters on his back, and that he was constantly taking mineral water for his constipation, and in refusing to strike such testimony out."

After the witness in question had testified to the fact that plaintiff had a weak back, wore plasters upon it, was troubled with constipation, and took bitter water from Mt. Clemens for that trouble, counsel for plaintiff interposed the following objection:

"*Mr. Salisbury:* I would like to put an objection on record. We object to any further testimony on the part of this witness, and ask to have the testimony thus far given stricken from the records, because the relation of husband and wife existed between the parties during the periods to which she testified.

"*The Court:* I think you may take the testimony until I study the case more carefully; if I desire to strike it out later, I will do so. Your objection may apply to further testimony, and to the refusal of the court to grant the motion to strike out."

The witness then testified:

"I never knew Mr. Pierson to be free from constipa-

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tion, and, when he was home, he was always taking the water. He used to refuse to ride in our carriage on account of hurting his back."

Section 10213, 3 Comp. Laws, so far as applicable, is as follows:

"Nor shall either [husband or wife], during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other, during the marriage."

In the case of *Hagerman* v. *Wigent*, 108 Mich. 192 (65 N. W. 756), this court held the foregoing provision to be but declaratory of the common law, and that it referred only to communications, confidential in character, made by the husband or wife during coverture. Such communications are inadmissible. *Maynard* v. *Vinton*, 59 Mich. 139 (26 N. W. 401, 60 Am. Rep. 276); *Hitchcock* v. *Moore*, 70 Mich. 112 (37 N. W. 914, 14 Am. St. Rep. 474); *Carter* v. *Hill*, 81 Mich. 275 (45 N. W. 988).

It is therefore necessary to inquire whether the facts and communications, testified to by Gertrude Wilson, were such as to fall within the inhibition of the statute. We think they were. The law is founded upon sound public policy, and its beneficent operation should not be frittered away by over refinement. Defendant urges that the objection was not seasonably made, and that it was not in terms based upon the statute. Neither contention has weight. The trial court clearly understood the nature and force of the objection, and, after deliberation, allowed the testimony to stand.

Error is assigned upon the charge of the court. We are of opinion that the charge carefully and properly instructs the jury as to the issues involved. After consideration thereof, it has been deemed unnecessary to discuss the other assignments of error.

Because of the error pointed out, the judgment is reversed, and a new trial ordered.

BLAIR, C. J., and GRANT, MOORE, and MCALVAY, JJ., concurred.

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METROPOLITAN LIFE INSURANCE CO. *v.* FREEDMAN.[1]

1. INSURANCE—ANNULMENT OF POLICY FOR FRAUD—FRAUD—INJUNCTION.
   A policy of insurance procured by the beneficiary named in it on the life of his father, under false representations made as to the age of the insured and as to the rejection of insurance by other companies, may be annulled in equity at the suit of the insurer, and an action at law on the policy enjoined.

2. SAME—FRAUD—EVIDENCE OF INTENT.
   The acceptance and retention by the insured of a policy which contains a copy of the false representations made in the application for insurance furnishes evidence of a fraudulent intent.

3. SAME—CONSPIRACY—FRAUD.
   The fact that false representations as to the rejection of the deceased by other companies were made by the agent for a company which had accepted the deceased as a risk, is not a defense to such suit in favor of the beneficiary who knew of the falsity of the statements and conspired with the agent to secure the policy.

4. SAME—RESCISSION—RETURN OF PREMIUMS—FORFEITURE PROVISIONS.
   Premiums paid upon a policy in which a clause was incorporated providing that they should be forfeited in case the application contained fraudulent representations, should be returned if the policy is rescinded by the decree, although they could not be recovered in an action by the insured.

5. EQUITY—MAXIMS.
   He who seeks equity must do equity.

Appeal from Wayne; Rohnert, J. Submitted October 14, 1909. (Docket No. 33.) Decided December 10, 1909.

Bill by the Metropolitan Life Insurance Company against Louis Freedman, executor of the last will and testament of Jacob Freedman, deceased, for the cancellation of a policy of insurance, and to restrain an action at law.

[1] Rehearing denied February 3, 1910.

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From a decree for complainant, defendant appeals. Modified and affirmed.

Haug & Yerkes (*Maybury, Lucking, Emmons & Helfman*, of counsel), for complainant.

Sloman & Sloman, for defendant.

BROOKE, J. Complainant files its bill to procure the cancellation and delivery of a policy of insurance issued by it upon the life of Jacob Freedman, and to enjoin the further prosecution of a suit at law upon said policy, pending at the time the bill was filed. From a decree in favor of complainant, defendant appeals.

It is claimed by the complainant that the policy in question was fraudulently obtained from it at the instance of Louis Freedman, a son of the deceased, executor of his estate, and sole beneficiary of the insurance, under his father's will. The fraud complained of is, that in the application for insurance the deceased made false statements (1) as to his age; (2) as to rejections by other companies; (3) as to his health. The record is very voluminous. We believe that to exhaustively analyze the testimony, pro and con, upon a disputed question of fact, would be of no value to the profession. It has, however, been examined with care, and from such examination we think it conclusively appears that, at the time the application was written, Jacob Freedman was many years past the age of 59 (the age given in the application). It further appears that applications for insurance on his behalf had been rejected by other insurance companies prior to the date of the application for insurance in the complainant company. His application to the Metropolitan Company contained a representation and warranty to the contrary.

It is urged on behalf of the defendant that the deceased was an ignorant man, of foreign birth, quite unable to read or write the English language, and speaking it but brokenly, and therefore it is not probable that he ever

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knew of the fraudulent character of the representations contained in the application, or made them wilfully and with intent to deceive. We do not think this position is tenable. It makes little difference in our opinion whether Jacob Freedman himself actually knew that the statements contained in this application, signed by him, were false, or ignorantly permitted himself to be used by his son Louis as a tool for the accomplishment of a fraud. The real defendant in this cause is Louis, the son, and it is entirely clear that he knew that his father's age was greater than was represented, and that other insurance had been refused. This is apparent from the fact that the applications which were rejected were made at the instance of Louis, and in them he was named as beneficiary. In any event, a complete copy of the application (containing the false representations) was set out on the third page of the policy, which was in the possession of either Jacob, the insured, or Louis, his son, from the time it was issued until Jacob died. It was Jacob's duty to *know* that the representations therein contained, and which constituted the inducement for the issuance of the policy, *were true*, and his silence during the life of the policy is persuasive proof of a fraudulent intent. *Cleaver* v. *Insurance Co.*, 65 Mich. 527 (32 N. W. 660, 8 Am. St. Rep. 908); *Haapa* v. *Insurance Co.*, 150 Mich. 467 (114 N. W. 380, 16 L. R. A. [N. S.] 1165, 121 Am. St. Rep. 627); *Genrow* v. *Modern Woodmen*, 151 Mich. 250 (114 N. W. 1009); *New York Life Ins. Co.* v. *Fletcher*, 117 U. S. 519 (6 Sup. Ct. 837); *Maier* v. *Life Ass'n*, 78 Fed. 566 (24 C. C. A. 239).

The defendant sought to show that the complainant had actual knowledge of the rejections, or might have learned of them by exercising reasonable diligence before issuing the policy, or, at any rate, before accepting the second premium.

It is urged, therefore, that complainant is estopped from setting up defendant's fraud, particularly in view of the fact that complainant accepted a second premium

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when it knew, or might have known, the facts now relied upon by it. This contention would have force if the proofs sustained it. We are of the opinion that they do not. One Newton Burnham, an agent for the John Hancock Insurance Company, after insuring Jacob Freedman in his own company, seems to have aided Louis Freeman in the attempt to secure additional insurance on Jacob's life. In furtherance of that design, he notified soliciting agents of other companies (including complainant) that policies might be written on Jacob's life. He undoubtedly did this in some instances after he knew that insurance had been refused, but he was not the agent of the complainant, and owed it no duty. He did communicate the fact of the rejections to Louis, and, after such knowledge was communicated to Louis, he (Louis) caused further applications to be made. It would, we think, be a novel doctrine to permit Louis to urge the fraud of his co-conspirator in excuse or palliation of his own wrongdoing.

Paragraph 11 of complainant's bill is as follows:

"That the first two annual premiums upon said policy were paid to your orator, and such payments amount to the sum of $421.60, and notwithstanding that said policy provided that, if any statement in the application herein referred to is not true, all premiums paid shall be forfeited to the company, and, notwithstanding your orator is lawfully entitled to retain said premiums, yet your orator is now ready to tender into court the sum of $421.60, and which sum the complainant is now ready to pay to the said Louis Freedman, executor, when so directed by this court; and your orator hereby offers to pay and tenders the same unto the register of this court, to be paid to the said defendant, Louis Freedman, executor, when so directed by this court."

The last paragraph of the decree in the circuit court is as follows:

"It is further decreed that said policy is by this court declared to be null and void on account of fraud; therefore, that premiums shall be retained by the said complainant, but that no costs shall be awarded in this cause to either party."

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We are of the opinion that in the disposition of the premiums paid the learned circuit judge was in error. While it is true that where the policy is obtained by means of fraudulent misrepresentations, the premiums cannot be recovered back by the insured (see 2 May on Insurance [4th Ed.], § 567, and cases cited), we think a different rule obtains where the company seeks to avoid the contract on the ground of fraud. In that event, the complainant must recognize the maxim that he who seeks equity must do equity. It would, indeed, be strange, if the complainant could say:

"This contract was obtained from me by fraud. Therefore, it is void—void, except as to the provision therein contained that, in the event of fraud, the premiums paid should be retained by the company. As to that provision, it is valid."

No authorities need be cited to show the untenable character of such a claim. At the time the bill was filed the complainant itself recognized this fact, and it cannot now be heard to urge the contrary. The complainant should have recovered costs in the court below.

The decree of the circuit court will be modified, in that the complainant will be required to repay the amount of the two premiums collected, with interest thereon from the date of filing its bill. Complainant will recover costs of the circuit court to be taxed.

Defendant will recover costs of this appeal.

BLAIR, C. J., and GRANT, MOORE, and MCALVAY, JJ., concurred.

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COURSER v. JACKSON.

1. APPEAL AND ERROR—DEATH—NECESSITY OF SUGGESTION—SETTLEMENT OF BILL OF EXCEPTIONS.
On error from a judgment for a defendant who died prior to the settlement of the bill of exceptions, and whose death was not suggested on the record, the court will not review such judgment until a party is substituted whom the judgment of the court would bind.

2. ATTORNEY AND CLIENT—DEATH—AUTHORITY.
An attorney's authority is generally terminated by the death of the client.

Error to Montcalm; Davis, J. Submitted October 20, 1909. (Docket No. 127.) Decided December 10, 1909.

Case by Arnold Courser, by next friend, against Homer Jackson for personal injuries. A judgment for defendant is reviewed by plaintiff on writ of error. Dismissed.

Earl F. Phelps and *L. C. Palmer*, for appellant.

OSTRANDER, J. This cause was upon the calendar for this October, 1909, term of court, and was reached in its order on October 20th. Counsel did not appear, and but one brief, that for plaintiff and appellant, has been filed. The action is trespass on the case for damages for personal injuries alleged to have been inflicted by defendant upon the infant plaintiff. There has been no trial upon the merits, but the cause was brought on for trial at the October, 1908, term of the circuit court, where a judgment was rendered for the defendant. A motion to set aside the judgment and reinstate the case for trial was denied March 30, 1909, and later—we assume that it was on or about May 19, 1909—a bill of exceptions was settled.

On October 18 and 19, 1909, there were filed in this

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court the affidavits, respectively, of counsel who appeared for defendant in the court below, from which it appears that on March 22, 1909, the defendant died, and that counsel, believing themselves to be without authority in that behalf, took no part in settling the bill of exceptions or in any proceedings thereafter had, and of that said conclusion and attitude informed counsel for appellant on or about the day that the bill of exceptions was noticed for settlement. To these alleged facts this court, by its clerk, called the attention of counsel for appellant, who had filed an affidavit and brief which do not dispute, but impliedly, at least, admit, that defendant died before exceptions were settled, and present the contention that, until counsel for the defendant suggest the death and bring upon the record the representatives of decedent, they are at liberty to proceed as though they in fact had no knowledge of defendant's death. They say, too, that counsel for defendant are not in a position to raise the question. Counsel do not raise the question. It was proper, the names of counsel for defendant appearing upon the record, that they should advise the court of the situation. It must be assumed that their authority did not survive the death of their client. Plaintiff is the moving party in this litigation, seeking to obtain a judgment—in this court a judgment reversing a judgment in favor of defendant.

This court must decline to take action in the premises until a defendant upon whom its judgment will be binding is brought upon the record.

GRANT, MONTGOMERY, MOORE, and MCALVAY, JJ., concurred.

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SUCHOCKI v. CALUMET INSURANCE CO.

APPEAL AND ERROR—BILL OF EXCEPTIONS—AMENDMENTS.

The amendment of a bill of exceptions to include an omitted bill of sale on the order of the Supreme Court (*Suchocki* v. *Insurance Co.*, 158 Mich. 62 [122 N. W. 216]), in an action on an insurance policy wherein a verdict was directed in favor of the defendant on the ground that the plaintiff conveyed the insured property by bill of sale to secure a loan, is conclusive of the question whether or not the bill of sale was introduced in evidence.

Error to Wayne; Rohnert, J. Submitted October 14, 1909. (Docket No. 104.) Decided December 10, 1909.

Assumpsit by Wladislaw Suchocki against the Calumet Insurance Company on a policy of insurance. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Dohany & Dohany, for appellant.

Russel, Campbell, Bulkley & Ledyard, for appellee.

MOORE, J. The following statement of facts is taken from the brief of appellant:

"On the 27th day of June, 1906, appellant was engaged in the saloon business in the city of Detroit, and on that date secured a policy of insurance in the sum of $1,500 from the appellee, covering his stock in trade, fixtures, and household furniture. On January 2, 1907, a fire occurred, and all of his stock, furniture, and fixtures were destroyed. Appellant brought this action on said policy, and the principal defense urged by appellee and upon which the court directed a verdict in appellee's favor, was that appellant had, after the issuance of said policy, given a bill of sale, in the nature of a chattel mortgage on a portion of the property covered by the policy of insurance, for the sum of $70."

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The only error assigned is that the court erred in directing a verdict in favor of defendant and against the plaintiff, of no cause of action, on the ground that "there was a bill of sale given, apparently from the testimony of witnesses, to secure the repayment of a loan on the property covered by the policy of insurance, on which at the time of the fire there was $40 due."

Counsel say the instrument upon which the trial judge directed a verdict was not offered and received in evidence. That contention was before us in *Suchocki* v. *Insurance Co.*, 158 Mich. 62 (122 N. W. 216), where it was ordered that an addition to the return of the writ of error and to the printed record should be made by adding thereto a copy of the bill of sale. This additional return disposes of the contention of counsel stated above.

The judgment is affirmed.

BLAIR, C. J., and GRANT, MCALVAY, and BROOKE, JJ., concurred.

KUENNAN *v.* UNITED STATES FIDELITY & GUARANTY CO.

1. EVIDENCE — BOOKS OF ACCOUNT — PERFORMANCE OF CONTRACT.
   The plaintiff's books of account showing the number of loads of material furnished under a contract to deliver sand and gravel for the construction of a public sewer, are admissible in evidence to show the number of loads delivered when they are supported by further testimony showing their correctness, in an action against the surety on the statutory bond to protect materialmen.

2. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — BONDS — PUBLIC BUILDINGS AND WORKS.
   A contract is executed for public works within the meaning of

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8 Comp. Laws, § 10743 when a construction company submits a proposal which is accepted and the work completed upon the giving of statutory bonds for the performance of the work and payment for materials and labor, although no formal contract was executed.

3. SAME—PUBLIC OFFICERS—CONSTRUCTION BONDS.
It is the duty of public officials of a municipal corporation to secure a compliance with the statute governing the construction of public buildings and works.

4. CORPORATIONS — FOREIGN CORPORATIONS — VALIDITY OF CONTRACTS.
A surety is liable on its bond for the construction of a public work where the contractor, a foreign corporation, which has omitted to comply with the requirements of statute for the carrying on of business within the State, fails to pay for material furnished.

5. SAME—FOREIGN CORPORATIONS — ESTOPPEL TO DISPUTE VALIDITY OF CONTRACTS.
A foreign corporation engaged in business in Michigan is estopped to dispute the validity of its contracts for non-compliance with the statute regulating the transaction of local business. Act No. 34, Pub. Acts 1903.

6. SAME—VALIDITY OF CONTRACTS.
Such contracts are not void, but merely unenforceable by the foreign corporation until it complies with the statute.

Error to Kent; McDonald, J. Submitted October 22, 1909. (Docket No. 19.) Decided December 10, 1909.

Assumpsit by Frederick W. Kuennan against the United States Fidelity & Guaranty Company and the National Construction Company on a statutory bond. A judgment for plaintiff on a verdict directed by the court is reviewed by defendant the United States Fidelity & Guaranty Company on writ of error. Affirmed.

Judah, Willard, Wolf & Reichmann and *Bundy, Travis & Merrick*, for appellant.

Thomas P. Bradfield, for appellee.

OSTRANDER, J. This is a suit brought to recover the price and value of materials used in building a public

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work, namely, in the construction of a sewer in the city of Grand Rapids by the defendant National Construction Company. The bond, specially counted on in the declaration, is the statute bond (3 Comp. Laws, §§ 10743–10745), and was made in August, 1905. The defendant National Construction Company was not served with process and did not appear. There was testimony tending to prove that service of process could not be made upon it within the State. Verdict for the plaintiff against the defendant surety company was entered by direction, and judgment followed the verdict. The contentions of appellant are: (1) That the court was in error in holding that the demand of the plaintiff against the construction company was proven. Involved in this is the question whether certain books of account kept by plaintiff should have been received in evidence. (2) It having been pleaded and admitted that the defendant construction company is a foreign corporation which had not acquired the right to do business in this State, therefore its contract with the city is illegal and invalid; for which reason the collateral and dependent liability of the surety company, appellant, upon the bond in suit, cannot be enforced.

1. Plaintiff established his demand, by undisputed testimony, if his account was competent evidence of the quantity of material delivered to the contractor. His arrangement with the contractor required him to furnish all of the sand and bank gravel needed in the construction of the sewer. The price was agreed upon. The material was furnished, and all that was furnished was used. These facts were established without recourse to the account. There was no witness, who, without reference to the account, could testify to the number of loads of material which were furnished. The teamsters who delivered material when directed so to do were not called as witnesses nor was it shown that they could not be called. The account was made by the plaintiff on the evening of each day, from the report of his foreman.

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The slips upon which the foreman kept his tally were destroyed daily.

Appellant relies upon the rule of *Jackson* v. *Evans*, 8 Mich. 476; *Swan* v. *Thurman*, 112 Mich. 416 (70 N. W. 1023); *Taylor-Woolfenden Co.* v. *Atkinson*, 127 Mich. 633 (87 N. W. 89). It would, of course, have been competent to prove by the teamsters that they delivered to the contractor all material which they were directed to deliver to him. And if such testimony had been produced, it is probable that no objection would have been made—none would have been proper—to admitting the account in evidence. There was testimony which, with inferences therefrom which it was proper for the court to draw, tended to prove that the account correctly tallied or numbered the loads of material which were furnished. The contractor —or its representative—said that it wanted gravel enough and did not want any left over. When material was needed it was ordered by messenger or by telephone. It was delivered, not at one point, but at different points along the line of the sewer where it was used. The teamsters were in the employ of plaintiff. As loads left the pit, they were directed by the foreman where to deliver the material and the loads were tallied. The foreman testified:

"I used to get my orders, and I used to have to send teams where the orders were to go. If I got an order to send to the Big Ditch [the sewer] I would send them over there. I kept track of the teams that went out on the different contracts, and when night came I would go into the house and give Mr. Kuennan the account and he would mark them off. * * * I know that when I would send a team to go to the Big Ditch they went right there. * * *"

Plaintiff testified:

"Every evening or in the morning the names were put on the slips where he [the foreman] was to send material. Frequently I went down to see if they had any material or were running out. When I went there I could see they were using our material. I used to go down once in

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a while with this Heath, their superintendent, to check up once in a while, and he would ask me how many loads I had, and he would look up his."

It is a reasonable, if not necessary, inference from the testimony that the contractor kept account of the material delivered by plaintiff, and that the two accounts, when comparisons were made, agreed. Without questioning the rule that performance of a contract to deliver articles may not be proved by books of account, or the one that when goods are delivered by agents and entries in books are made from their memoranda, or statements, the agents or some one having knowledge must be called to prove delivery, we are of opinion that the spirit and reason of the rules were not violated in holding that the books of account were admissible in evidence. Practically, there was a single fact to be established by the account, and that one not whether plaintiff performed his agreement with the contractor, but how many loads of material were required to do it. This fact, from necessity, must be proven by some memorandum. The circumstantial evidence of the trustworthiness of the memorandum produced is so convincing that it would be unreasonable to doubt it.

2. The defendant construction company entered into contract relations with the city of Grand Rapids, the subject-matter thereof being the construction of a public work. Some reference is made to the fact that the construction company did not formally execute the written agreement. It did submit its proposal to do the work and it gave a bond conditioned for the performance of the work, in which reference is made to "the foregoing contract." It would appear from the printed record that the proposal, contract, and the bonds were so attached, and by references in each were so connected, as to constitute practically one complete transaction. The construction company entered upon the work and built the sewer under the contract. We hold there was a contract within the meaning of the statute presently to be referred to. It was the duty of the proper officials of the city to secure a

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compliance with the provisions of the statute. The statute is entitled:

"An act to insure payment of wages earned, and for materials used, in constructing, repairing, or ornamenting public buildings, and public works."[1]

What is required by the statute is "security by bond, for the payment by the contractor, and all subcontractors, for all * * * materials furnished. * * *" The bond in suit was tendered and was accepted. By the terms of the statute:

"Such bond may be prosecuted, and recovery had, by any person, firm, or corporation, to whom any money shall be due and payable on account of having * * * furnished any materials in the erection * * * of such building or works. * * *"

The plaintiff is a person strictly within the provision of the statute above set out. Appellant refuses to pay because, it says, its liability is dependent upon the validity of the contract made by the city and the contractor, and that the contract is invalid because the contractor, a foreign corporation, is not admitted—has no legal right—to do business within the State. It is assumed that the appellant is organized for the purpose of furnishing the security demanded by the statute, charging and receiving a sufficient consideration for its undertaking. It would seem that its legal liability to laborers and materialmen ought at least to be co-extensive with the legal liability of the contractor to the same men. In its written undertaking are no conditions avoiding its liability excepting the one that the contractor itself pay such obligations as are due and payable. It is not contended that the construction company is not under legal obligation to pay the plaintiff. It had the benefit of plaintiff's material in the work. I think decision might be safely rested here. The same conclusion is arrived at, and for the same reason, when it is considered that the construction company is

[1] 3 Comp. Laws, § 10743. See, also, Act No. 187, Pub. Acts 1905.

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estopped to assert the invalidity of its contracts made in this State. *Showen* v. *Owens Co.*, 158 Mich. 321 (122 N. W. 640). Further than this, its contract with the city was not void. It could not be enforced by the construction company until it had complied with the statute. Act No. 34, Pub. Acts 1903; *Hastings Industrial Co.* v. *Moran*, 143 Mich. 679 (107 N. W. 706).

The judgment is affirmed.

GRANT, MONTGOMERY, MOORE, and MCALVAY, JJ., concurred.

NATIONAL CASH REGISTER CO. *v.* RICHARDS.

1. JUSTICES OF THE PEACE—APPEAL FROM JUSTICE'S COURT—RETURN—OPPORTUNITY TO BE HEARD.

   Under Act No. 475, Local Acts 1903, giving justices of the city of Detroit authority to grant motions for new trial, the hearing and determination of the motion by the court in the absence of counsel for one of the parties who had appeared at the time for which the motion was noticed, and left because the opposite counsel did not appear, is valid where the justice returned on a motion to vacate the order granting a new trial, that upon the showing made by the respective parties he thought a new trial should be granted.

2. SALES—CONDITIONAL SALES—CONTRACT—RIGHT TO POSSESSION.

   Upon the default by a vendee of personal property in making specified payments, the vendor is entitled to possession on declaration of forfeiture.

3. SAME—FORFEITURE—RESERVATION OF TITLE.

   The seller may elect, under a conditional contract of sale reserving title, to waive the default and continue the contract in force.

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4. SAME—NOTICE OF FORFEITURE—EVIDENCE.
A letter advising the purchaser that the contract of sale will be held by an attorney until a specified date, after which possession will be demanded, is an election to waive the default until the date named, and continue the contract in force.

5. SAME—CONSIDERATION—CONTRACTS.
No new consideration is required to render such waiver valid.

6. SAME—CONDITIONAL SALE—RESERVATION OF TITLE.
A sale of personal property with reservation of title to the seller, gives the purchaser only the right to possession, but no lien or special property in the subject-matter.[1]

7. DAMAGES—REPLEVIN—RETURN OF PROPERTY—NOMINAL DAMAGES.
In replevin by the seller of a cash register under a contract reserving title, the defendant who waives a return of the property is entitled, not to the value of the property, but to only such damages as are shown to have resulted from the seizure, and in the absence of evidence of actual damages, a judgment for nominal damages should be rendered.

Error to Wayne; Donovan, J. Submitted October 22, 1909. (Docket No. 156.) Decided December 10, 1909.

Replevin by the National Cash Register Company against Katie Richards and another. A judgment for defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed, and judgment entered for defendants for nominal damages and costs.

Graves, Hatch & Wasey, for appellant.

Frank C. Moriarty (*M. J. Lehman*, of counsel), for appellees.

OSTRANDER, J. Plaintiff sold a cash register to defendants and gave them possession thereof. The contract required defendants to pay $50 for the register, in installments, and title to the property was retained by plaintiff

[1] As to rights and liabilities of vendor and purchaser by conditional sale on default of payment, see note to *Cole* v. *Hines* (Md.), 33 L. R. A. 455.

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with the right, in case of the default of defendants in making any payment, to take possession of the property and forfeit payments made. On June 6, 1908, defendants had paid $20 and owed $30, all overdue. Possession of the register was demanded, refused, and this action of replevin instituted in justice's court. There was a judgment for the plaintiff. A new trial was granted on motion of defendants. A motion of plaintiff to set aside the order granting a new trial was denied, and on July 31, 1908, a judgment for defendants was rendered. They waived the return of the property, and their damages were assessed at $20. In the circuit court, to which plaintiff appealed, the jury, by direction, returned a verdict for defendants, assessing their damages at the sum of $20. Judgment was entered on the verdict, with costs to defendants.

At the trial in the circuit court, plaintiff offered no testimony; but a statement of facts made by the attorney for plaintiff appears to have been accepted as true. Defendants, without objection, introduced in evidence two letters written by plaintiff to defendant Katie Richards and received by her, dated, respectively, June 3 and June 12, 1908. Katie Richards was sworn and testified that the register was in good condition when taken upon the writ; that she could not value it, but it was worth at least $20. There is no other evidence of defendants' damages or of their interest in the property. The letter of June 3d, written by the plaintiff, by its treasurer, calls attention to the fact that the payments due February 7th, March 7th, and April 7th are unpaid, and states that, unless a remittance of $30 to cover the balance of the purchase price is made on or before the 10th instant, the account will be placed in the hands of plaintiff's attorney for collection. The letter of June 12th, written from Dayton, Ohio, is signed by the attorney of the plaintiff, states that the account has been received by him from the treasurer's department, with the correspondence, including the letter of June 3d, and that he will hold papers until June 25th

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before sending them to the attorney representing plaintiff at Detroit. If it is made necessary to forward the papers, "I will be forced to instruct him to take immediate possession of the register." Counsel for plaintiff requested the court to charge: That the said letter of June 3d was without consideration "so far as any extension was given to the defendants; that is, that the defendants parted with no consideration whatever, and the agreement for the extension is *nudum pactum;*" that the letter of June 12th is subject to the same objection, and also to the further objection that it was written after the suit was begun. The court was further requested to charge that there was no evidence of any damages sustained by defendants, that from any estimate of damages should be deducted the value of the use of the machine, and that a verdict for plaintiff with nominal damages be entered.

Defendants' notice of the motion for a new trial specified that it would be brought on for hearing before said justice at the opening of court, or so soon thereafter as counsel could be heard. Counsel for plaintiff attended at 9 o'clock, at the opening of court, and remained in the office of the justice until 9:45 o'clock, when the call of cases was concluded, and then, counsel for defendants not having appeared, asked the justice if he had the file of the case, and was told that he did not have it and did not know of said motion. Thereupon counsel for plaintiff left the office. The motion was called at 2 o'clock, and the order granting a new trial was entered; counsel for plaintiff being absent. In the affidavit for appeal, plaintiff raised the question of the regularity of this proceeding—indeed, the question of the power of the justice, in view of the notice of the motion, and in the absence of plaintiff, to vacate the first judgment. See Act No. 475, Local Acts 1903. Plaintiff having moved to set aside the order and the justice having returned that at the hearing of said motion plaintiff and defendants were heard, and the motion denied "because, upon the showing made by the respective parties, I thought a new trial should have been

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granted," we conclude that the principal objection, namely, that the judgment was vacated without giving plaintiff opportunity to be heard, is answered, and that the circuit court was right in so ruling.

The other exceptions relate to refusal of the court to charge as requested by plaintiff. It is contended: (1) That, if it is admitted that the letters referred to were offers on the part of plaintiff, there was no acceptance of such offers; (2) that, if accepted, there still was no consideration for forbearance or for the offer to forbear. The letters aside, plaintiff had the right to possession of the property after defendants' default and after demand. This would be so if the contract had not, in terms, so provided. *Wiggins* v. *Snow*, 89 Mich. 476 (50 N. W. 991); *Ryan* v. *Wayson*, 108 Mich. 519 (66 N. W. 370). But the defendants did not forfeit any rights by the mere neglect to pay on the day or days named (*Deyoe* v. *Jamison*, 33 Mich. 94), and plaintiff might either declare the forfeiture and retake the property, or waive the default and continue the contract in force (*Cable Co.* v. *Wasegizig*, 130 Mich. 387 [90 N. W. 24]). Plaintiff's letter of June 3d is plainly an election to continue the contract in force until the 10th instant, and the notification of such election to defendants. *Cole* v. *Hines*, 81 Md. 476 (32 Atl. 196, 32 L. R. A. 455). It was an election to receive the unpaid installments, rather than to forfeit the money which had been paid. For this purpose it was wholly unnecessary that a new consideration should move from defendants to plaintiff.

It follows that the demand made on June 6th was at least premature, and that when the writ of replevin was executed plaintiff was not entitled to possession of the property; but defendants' right to the property is the contract right. They have no lien upon, and no special property in, the register. *Ryan* v. *Wayson*, *supra*. A judgment in their favor for its value would manifestly be unjust. At most, they had a right to its possession until plaintiff elected to forfeit their rights, and to damages for

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detention. No proof was made of any damages suffered, and the right to a return of the property was waived. Under the circumstances, a judgment for defendants for nominal damages and for costs should have been rendered. *Farrah* v. *Bursley*, 100 Mich. 547 (59 N. W. 245); *Harris* v. *O'Gorman*, 118 Mich. 553 (77 N. W. 12).

The judgment of the circuit court is reversed, with costs of this court. The record will be remanded, with directions to enter a judgment for defendants, with nominal damages and costs.

GRANT, MONTGOMERY, MOORE, and MCALVAY, JJ., concurred.

PEOPLE, *for use of* KUENZEL, *v.* NATIONAL CONSTRUCTION CO.

CONTRACTS—BONDS FOR PUBLIC IMPROVEMENTS—MATERIALMEN—WORDS AND PHRASES—SUBCONTRACTORS.

A person who agrees with the contractor to manufacture and furnish cement blocks for a public sewer, making the blocks with machines furnished by the contractor, without undertaking to perform any part of the original contract with the city, is not a sub-contractor but a materialman, entitled to recover on the bond of the contractor for the security of laborers and materialmen. 3 Comp. Laws, § 10743.

Error to Kent; McDonald, J. Submitted October 22, 1909. (Docket No. 150.) Decided December 10, 1909.

Assumpsit by the people of the State of Michigan, for the use and benefit of Alfred H. Kuenzel and Frederick W. Kuennan, against the National Construction Com-

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pany, principal, and the United States Fidelity & Guaranty Company, surety, on a statutory bond. A judgment for defendants on a verdict directed by the court is reviewed by plaintiffs on writ of error. Reversed.

Thomas P. Bradfield, for appellants.

Bundy, Travis & Merrick and *Judah, Willard, Wolf & Reichmann*, for appellees.

OSTRANDER, J. This suit is brought upon the statute bond referred to in the opinion of this court in the case of Frederick W. Kuennan against these defendants. *Ante*, 122 (123 N. W. 799). That opinion is decisive of the defenses interposed by the defendants in the court below in this case, excepting only of the question whether plaintiffs were materialmen or were subcontractors. Being of opinion that they were subcontractors, the learned trial judge directed a verdict for defendants. The material facts are not disputed and may be stated in few words. The National Construction Company undertook to construct in and for the city of Grand Rapids a sewer according to certain plans and specifications. In the construction of the sewer, concrete blocks were used and these blocks were of different sizes as the sewer varied in its diameter. Six blocks of the same size, when in position, completed a circle. Plaintiffs manufactured and furnished 15,814 blocks, at an agreed price of 22 cents each, which were used in the sewer, and the construction company is indebted to them therefor in the sum of $1,153.48. The steel molds in which the blocks were formed were furnished to the plaintiffs by the construction company. When plaintiffs entered into parol agreement with the construction company to furnish these blocks, the sewer was partly constructed and the concrete blocks theretofore used were made either by the construction company or by some one for it. Plaintiffs agreed to furnish so many as should thereafter be needed. Plaintiffs did not carry such blocks in stock, but had before manu-

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factured similar blocks for use in a smaller sewer. There is nothing novel in molding concrete into the form of blocks, the size of the blocks varying as the particular use they are put to demands. A block made in the form furnished by the contractor in fact answered the requirements of the specifications as to form and size, and also answered in these respects the contract between the plaintiffs and the contractors. So if made of proper material, if properly hardened, and if delivered for use at the sewer without being broken or damaged, it answered the requirements of both contracts. The number required would be determined by the length of the sewer to be made of them, and the length of the sewer would be found by consulting the plans. Nevertheless, it is clear that plaintiffs were concerned only to manufacture blocks of proper material in the forms or molds which were furnished, to allow them to properly harden and to deliver them on the line of the sewer. A block not according to specifications would be a block not conforming to the mold or one otherwise imperfect, and would be acceptable neither to the contractor nor the city. It would be wholly immaterial whether it was rejected by an inspector employed by the contractor or by one employed by the city. It is not always easy to determine whether one is a subcontractor or a materialman, though at various times attempts have been made to state a rule according to which the relation may be determined. We think it is made clear in this case that plaintiffs never undertook to perform any part of the original contract with the city, however complete their knowledge of its requirements may have been. They undertook to, and it appears that they did, perform their contract with the contractor, and the case upon the facts cannot be distinguished from *People, for use of Hirth*, v. *Powers*, 108 Mich. 339 (66 N. W. 215); *Staffon* v. *Lyon*, 104 Mich. 249 (62 N. W. 354). On the other hand, the facts are essentially unlike those appearing in *Avery* v. *Board of Sup'rs of Ionia Co.*, 71 Mich. 538 (39 N. W. 742); *People, for use of Winkle*

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Terra-Cotta Co., v. *Cotteral*, 119 Mich. 27 (77 N. W. 312); *People, for use of Reynolds*, v. *Banhagel*, 151 Mich. 40 (114 N. W. 669).

The judgment is reversed. As the record leaves it uncertain whether the amount due to the plaintiffs, if defendants are found to be liable, is agreed to, a new trial is granted.

GRANT, MONTGOMERY, MOORE, and MCALVAY, JJ., concurred.

MAYO *v.* LATHAM.

1. FRAUD—DECEIT—EXPRESSION OF OPINION.
   The expression of an opinion that the price of goods sold is cheaper than the buyer can procure them for elsewhere, does not constitute fraud although it is untrue.

2. SALES—CONTRACT—BREACH—DAMAGES.
   A purchaser of shrubbery who cancels the order after the seller has dug up and set aside the property for him, is not liable for the entire purchase price, but for damages for the breach merely.

Error to Wayne; Donovan, J. Submitted October 20, 1909. (Docket No. 129.) Decided December 10, 1909.

Assumpsit by Emerson S. Mayo against Charles K. Latham for breach of a contract for the sale of certain trees. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

W. C. Stuart, for appellant.

Clark, Lockwood & Bryant, for appellee.

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MOORE, J. On January 27, 1906, appellant signed a written order to plaintiff for certain trees and shrubbery amounting to $74.30. This order was received by plaintiff January 31, 1906. It was accepted by plaintiff on February 1, 1906, by letter, and prior to February 27th, when defendant claims to have canceled the order, the trees and shrubs had been dug and set aside for plaintiff. On January 31, 1906, plaintiff paid to the agent, who took this order, a commission amounting to $22.29. On February 20, 1906, appellant wrote plaintiff, in effect, that he desired to make some little change in the order. On February 27, 1906, he wrote, canceling the order. Plaintiff refused to cancel the order, and the stock was shipped about April 14, 1906. On April 17th the appellant wrote that he would not receive nor accept the goods. In due course of time, suit was commenced in justice's court. The plaintiff declared, "in an action of assumpsit on all the common counts, specially for a breach of written contract, claims damages $500.00 or under, the defendant pleads the general issue," etc. The case was tried by the justice and resulted in a judgment for plaintiff. An appeal was taken and judgment was rendered for plaintiff of $74.30 and costs. The case is brought here by writ of error.

Two defenses were interposed: *First*, that the order was obtained by fraud; *second*, that the order was canceled. The fraud claimed is that the agent who sold the goods said that the price charged was as cheap or cheaper than they could be bought for elsewhere. We think the record discloses only an expression of opinion on the part of the agent, and, even though it should appear that similar goods could have been secured elsewhere at a less price, it would be no ground for annulling the contract. *Collins* v. *Jackson*, 54 Mich. 186 (19 N. W. 947); *Moon* v. *McKinstry*, 107 Mich. 673 (65 N. W. 546).

As before stated, the defendant notified plaintiff by letter that he canceled the contract and would not take the goods. Defendant preferred a number of written re-

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quests to charge. The judge declined to give these and gave a general charge that was not clear, and some parts of which it would be difficult to harmonize with other parts of it. In one part of the charge, the jury were instructed that the only defense in the case was the false statement of the agent. This we have already seen was a mistake. The jury were told:

"The contract between the parties was executory; that is, it was not complete. It was in the course of execution, and when broken by the defendant by his letter to the plaintiff—well that is incomplete, strike it out.

"*Mr. Latham:* That refers back. It is also executory when made and when the letter was written.

"*The Court:* Executory when made, and it remains so. That is the claim of the defendant, if you believe their testimony, that would be true. An executory contract is an agreement between parties to do a certain thing. It is an executed contract when the thing is done. An executed contract cannot be broken, because it is complete of itself. An executory contract can be broken by either party thereto, by his refusal to execute it, but the one who breaks a contract is liable for damages to the other party if the damages had been sustained and are proven. * * * Now we are to look at this matter in a substantial manner, and I will state it in my own way as I thought it over after I went home last night. The parties entered into a written contract. The order accepted is a written contract. Only one of the parties consented to the breaking of that contract; that is, Mr. Latham. The other side did not consent to it. The party is the defendant then that consented, or took upon himself, the risk of breaking it and standing the consequences. If he did it without any legal cause, why it will stand as though not broken at all. If you find that he had legal cause, it would stand, a verdict for the defendant. That is, in other words, if you believe the plaintiff, his depositions, his evidence, you would find $74.30 with interest about two years; but if you believe the defendant's evidence, that he was induced to buy shrubs at an exorbitant price, at a price beyond what they were reasonably worth, and not knowing so much about them as the agent, if he has maintained his case, you will find no cause of action."

The rule as to the measure of damages which should

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control in the case is stated in *Wigent* v. *Marrs*, 130 Mich. 609 (90 N. W. 423). The attention of the court was called to this case; but he failed to give the proper instructions.

Judgment is reversed, and new trial ordered.

GRANT, MONTGOMERY, OSTRANDER, and MCALVAY, JJ., concurred.

SCHOENFELD v. BOURNE.

ATTACHMENT—PROCESS—CONSTRUCTIVE SERVICE—PUBLICATION OF NOTICE.

Published notice of an action pending in attachment proceedings without personal service, is jurisdictionally defective as constructive service by reason of an incorrect designation of one of two joint defendants as "William H. Dunton" instead of "William H. Denton."

Error to Gratiot; Searl, J. Submitted October 19, 1909. (Docket No. 109.) Decided December 10, 1909.

Attachment proceedings by Fred Schoenfeld against Benjamin W. Bourne and William H. Denton. A judgment quashing the writ is reviewed by plaintiff on writ of error. Affirmed.

Hollis C. Johnson, *O. G. Tuttle*, and *John T. Mathews*, for appellant.

Stone & Watson, for appellees.

MOORE, J. The plaintiff is a resident of Ohio. The

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defendants reside in the Republic of Mexico. Plaintiff proceeded against the defendants in the circuit court for the county of Gratiot, by attachment, by reason of the nonresidence of the defendants. The writ issued July 10, 1908. Plaintiff attempted to publish a notice of attachment, but in the published notice named the defendants as "B. W. Bourne and William H. Dunton." On October 15, 1908, an affidavit of publication was filed, made by one of the publishers of the Gratiot Journal, stating therein that the notice annexed thereto had been published in said paper at least once in each week for six weeks, and that the first publication thereof was on the 27th day of August, 1908. This affidavit was subscribed and sworn to on October 9, 1908. On November 6, 1908, the plaintiff filed his declaration, and on the following day entered the default of the defendants. On November 12, 1908, plaintiff took a judgment against the defendants for $6,070.66, and costs. On January 4, 1909, defendants entered a motion to set aside the judgment and quash the writ. On March 4, 1909, the court entered an order granting defendants' motion. The case is brought here by writ of error.

The contentions of defendant are:

(1) That, because of the failure of the plaintiff to publish the notice of attachment as required by statute, the court never acquired jurisdiction in the case.

(2) That, because of the plaintiff's failure to file proof of publication of the notice of attachment as required by statute, the court, in any event, did not acquire jurisdiction to render judgment in the case.

Both of these contentions are opposed by the plaintiff, and while he concedes that, because of lack of personal service of process, it would be the duty of the court to set aside the judgment, and permit the defendants to come in and defend, yet it is his contention that his proceedings and judgment are regular, and the court has only discretionary power to set aside the judgment. In our view of the case, the only question necessary to be considered is

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whether the publication of notice was fatally defective because defendant William H. Denton was called therein William H. Dunton.

The claim of plaintiff as to this feature of the case is stated by counsel as follows:

"It seems to me clearly the name of 'Dunton' is *idem sonans* to 'Denton,' or perhaps, more properly speaking, the names of 'Bourne and Dunton' are *idem sonans* to 'Bourne and Denton.' Especially is this so where they are brought into court at the suit of Fred Schoenfeld, and declared against as joint defendants under a written contract relation. It will be interesting in this connection to examine some of the cases in Michigan upon the question of *idem sonans*. The name of Kinney and Kenney are held *idem sonans*. *Kinney* v. *Harrett*, 46 Mich. 87 (8 N. W. 708). Also Dixon and Dickson. *Reading* v. *Waterman*, 46 Mich. 107 (8 N. W. 691). Also Brearley and Brailey. *People* v. *Gosch*, 82 Mich. 31 (46 N. W. 101). Also Ruty and Ruthe. *Ruthe* v. *Railroad Co.*, 37 Wis. 344; *Van Benschoten* v. *Fales*, 126 Mich. 176 (85 N. W. 476)."

An examination of these cases will show that they are clearly distinguishable from the one before us. Only one of them, the last one, was an attachment case. There an alias writ was taken out, and the names of the defendants were therein correctly given, and a personal service of the writ was had upon one of the defendants. In the case at bar there was no personal service.

In *Granger* v. *Judge of Superior Court of Detroit*, 44 Mich. 384 (6 N. W. 848), Justice CAMPBELL, speaking for the court, said:

"Where cases and proceedings are not according to the usual course, and are special in their character, they are held void on slighter grounds than regular suits, because the courts have not the same power over their records to correct them. So where there has been no personal service within the jurisdiction, the doctrine prevails that proceedings not conforming to the statutes are void; but this is on the ground that there has been no service whatever, and the party therefore has not been notified in any proper way of anything. The purpose of the statutory

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methods is to furnish means from which notice may possibly or probably be obtained; but, as a court acting outside of its jurisdiction is not recognized as entitled to obedience, the special statutory methods stand entirely on their own regularity, and, if not regular, cannot be said to have been conducted under the statutes. The distinction is obvious, and is not imaginary."

In *Steere* v. *Vanderberg*, 67 Mich. 530 (35 N. W. 110), Justice CHAMPLIN, speaking for the court, said:

"It is a settled rule of law that all exceptional methods of obtaining jurisdiction over persons not found within the State must be confined to the cases and exercised in the way precisely indicated by the statute, and it may also be regarded as settled law that a failure to comply with the statutory requirements where the jurisdiction conferred is special, and no personal service is obtained, renders the judgments null and void. *Thompson* v. *Thomas*, 11 Mich. 274; *King* v. *Harrington*, 14 Mich. 532; *Millar* v. *Babcock*, 29 Mich. 526; *Johnson* v. *Delbridge*, 35 Mich. 436; *Woolkins* v. *Haid*, 49 Mich. 299 (13 N. W. 598); *Rolfe* v. *Dudley*, 58 Mich. 208 (24 N. W. 657)."

In *Jaffray* v. *Jennings*, 101 Mich. 515 (60 N. W. 52, 25 L. R. A. 645), Justice HOOKER, speaking for the court, said:

"We start with the proposition that attachment is a harsh and extraordinary remedy, unknown to the common law; and the statutory provisions upon which the right depends, being in derogation of the common law, must be strictly construed, and cannot be extended beyond their terms. See cases cited in 1 Jac. & C. Dig. p. 96, § 1; *Estlow* v. *Hanna*, 75 Mich. 219, 224 (42 N. W. 812)."

In the opinion in the case of *Fanning* v. *Krapfl*, 61 Iowa, 417 (14 N. W. 727, 16 N. W. 293), is found the following language:

"In considering the question, we must not be misled by the singularity of the name. If a notice to A. B. Smith would not be sufficient, if published, as to B. A. Smith, then we think that the notice in this case is not sufficient. The question before us concerns the title to real estate, and it would not be possible to base any safe rule upon the distinction between names that are peculiar and those

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that are not peculiar. Notice by publication, even where there is no misnomer, does not afford a very strong natural presumption that the fact of the pendency of the action will be brought to the defendant's actual knowledge. Notice by this mode is allowable only out of necessity. It must often happen that great injustice is done and great hardship suffered. We are not disposed to open the door any wider than necessity requires. Whoever undertakes to give notice by publication, and misnames the defendant, is without excuse. It requires very little care to publish the defendant's name correctly. We are evidently justified in holding the plaintiff who gives notice by publication to a considerable degree of strictness. If we were to adopt the rule contended for by the appellee, that not only can the Christian names be entirely omitted, but the initial letters of the Christian names transposed, this might become the favorite mode of giving notice by publication. It appears to us that we should open the door to mischief of which no one could see the end."

In *Hubner* v. *Reickhoff*, 103 Iowa, 368 (72 N. W. 540, 64 Am. St. Rep. 191), it was held that where service in an action for divorce against a nonresident is by publication, and defendant makes default, the court cannot assume that the name "Keesel" in the notice should be understood as "Keisel," the name of the defendant, on the principle of *idem sonans*, and the decree was held void. See, also, *Estlow* v. *Hanna*, 75 Mich. 219 (42 N. W. 812), and *Cochrane* v. *Johnson*, 95 Mich. 67 (54 N. W. 707).

Applying the principles stated in these cases, we think it clear that in an attachment case against Benjamin W. Bourne and William H. Denton, nonresidents, where no one is personally served with process, the court does not get jurisdiction, because of the publication of a notice describing the defendants as Benjamin W. Bourne and William H. Dunton.

Judgment is affirmed.

GRANT, MONTGOMERY, OSTRANDER, and MCALVAY, JJ., concurred.

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McCALL *v.* McCALL.

1. REAL PROPERTY — LIFE ESTATE — REMAINDERS — MORTGAGES — DUTY TO PAY INTEREST.

   A life tenant who omits to perform his duty to pay the interest on a mortgage covering the premises, and who obtains a conveyance from the purchaser at the foreclosure sale, holds the property subject to the rights of his minor children who own the remainder, and their interest is not divested by a transfer of the realty to a son who had notice of the facts.

2. EQUITY — LACHES — KNOWLEDGE AND NOTICE.

   Complainants are not barred by laches from questioning conveyances of the property to their brothers, where they moved promptly after their father's death and after notice, by the assertion of an adverse claim that the repurchase was not intended for their benefit, being entitled until such notice to assume that the repurchase was originally for their benefit and that the subsequent conveyances affected only the life estate.

3. SAME — ESTATES IN REMAINDER — REIMBURSEMENT OF LIFE TENANT.

   In a suit to set aside an invalid conveyance to the defendant, who claimed to have paid a certain amount due on an outstanding mortgage and taxes for the construction of a drain, and who claimed an allowance for care and support furnished to his father, a decree disallowing the other claims and requiring reimbursement to the defendant for the amount paid on the mortgage is affirmed on the ground that it is supported by evidence of the defendant's having had the use of the farm and having moved valuable buildings from it to his own land.

Appeal from Gratiot; Dodds, J., presiding. Submitted October 19, 1909. (Docket No. 107.) Decided December 10, 1909.

Bill by Daniel McCall and others against Abram McCall and another to set aside certain deeds. From a decree for complainants, defendant Abram McCall appeals. Affirmed.

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John M. Everden (*John T. Mathews*, of counsel), for complainants.

Stone & Watson, for appellant.

One John H. McCall and his wife, Barbara, owned in their lifetime 160 acres of adjoining land, each owning 80 acres. The 80 acres belonging to the wife was the homestead. Complainants and defendants are their children. Two days before the mother died, she and her husband made a disposition of these lands. The husband executed a deed of his 80 acres to his two sons, Robert and Abram, deeding to each a 40. Mrs. McCall joined in that deed. The mother executed a deed of her 80 to her husband for life, with remainder to her children, the complainants, and the defendant William, the same to be equally divided among them upon the death of her husband. These deeds were executed April 5, 1892, and were at once delivered and recorded. There was a mortgage originally given for $600 upon the land owned by the mother, with interest at 8 per cent. Four hundred ninety-five dollars and fifty-three cents remained unpaid at her death. Some of the children were then minors. After the mother's death, the father and children continued to live upon the farm; the daughters doing the housework; one remaining at home and keeping house, while the other worked out. The older boys were at work elsewhere much of the time.

In 1897 Mr. McCall leased the 80 acres in which he had a life estate to the defendant Abram. Abram took possession of the land, moved into the house, and his father lived with him. The father sold his personal property and paid his debts. Abram continued to occupy the premises under his lease until November 21, 1904. Meanwhile Mr. McCall, the father, failed to pay the interest on the mortgage. The mortgagee, one Mrs. Cameron, foreclosed, bid the property in for the amount due, with interest and costs of the foreclosure, amounting in all to $560.19. The sale became absolute March 2, 1897. On April 14th following

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Mrs. Cameron deeded the 80 acres back to John H. McCall, the father, for $635, being the amount of principal, interest, and additional costs, and took back from him a mortgage for that amount. Meanwhile, Abram built a house upon his own 40, deeded to him by his father, and moved the buildings of the former home to his own land. His father continued to live with him until his death, June 19, 1906.

On November 21, 1904, the father deeded the west 40 acres of the mother's 80, which was the homestead, to the defendant Abram. He at the same time, or shortly before, deeded the east 40 acres to defendant William. By the arrangement William assumed and agreed to pay $500 of the mortgage, and the defendant Abram was to pay the balance, $135. On December 2, 1907, complainants filed this bill praying that the deeds made by their father to the defendants be set aside, and that the title to four-fifths of the lands described therein be decreed to them. The claim against William has been satisfactorily settled by the parties, so that the controversy now is entirely between defendant Abram and complainants. The case was heard upon pleadings and proofs taken in open court and decree entered for complainants; the decree, however, requiring the complainants and defendant William to pay to defendant Abram the $135, which he had paid upon the mortgage.

GRANT, J. (*after stating the facts*). 1. Mr. McCall, the life tenant, occupied a position of trust towards his children, the remaindermen. It was both his legal and moral duty to pay the taxes and interest upon the mortgage. His moral obligation was greater because of the minority of some of the remaindermen. The law does not permit a life tenant for any reason to neglect to pay taxes and interest, and obtain title in fee by purchasing the land at tax or foreclosure sales. In making such purchases, the life tenant is only paying what the law compels him to pay. He then stands in no other or different relation to the re-

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maindermen than he would if he had paid the taxes and interest in season. We are not concerned with the motives of the life tenant in the instant case in neglecting to pay the interest and permitting a foreclosure. It would not avail the defendant if there was no understanding or agreement between the life tenant and the mortgagee that the title after foreclosure should be reconveyed to the life tenant. The interest was less than $40 per year, and the interest was all that the mortgagee desired. The defendant purchased only the interest of his father, the life tenant, and that was a life interest. He is not an innocent purchaser. He knew the conditions of the deed from his mother to his father, and his brothers and sisters. He knew that it was the duty of his father to protect those interests. Estates in remainder cannot thus be destroyed. The case is controlled by *Bowen* v. *Brogan*, 119 Mich. 218 (77 N. W. 942, 75 Am. St. Rep. 387); *Lewis* v. *Wright*, 148 Mich. 290 (111 N. W. 751).

2. The complainants were not guilty of laches. If they knew of the foreclosure and repurchase by their father, they had a right to assume that the repurchase was for the protection of their interests. There is evidence that the father so stated. Even if they learned that their father had deeded the land to the defendant, they had the right to believe that the deed conveyed only the life estate which the father had possessed. They moved promptly after their father's death, and the assertion on the part of the defendant that he owned the title in fee.

3. Defendant claims that, if he had not title in fee, the complainants should compensate him for the care of his father, and a certain drain tax which he paid. The evidence shows that the father worked upon the farm with his son until he was stricken with paralysis, about 18 months before his death. He was more or less helpless for about seven months before his death. Defendant and his wife took care of him, but employed no nurse or other person to attend him. Defendant had the use of the land,

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and appropriated to his own use the buildings that were on it. These were worth between $200, the least valuation put upon them, and $1,000, the highest. Under the evidence, we think he is not entitled to compensation for the care of his father or the taxes paid, and that the requirement that complainants pay that part of the mortgage which he assumed, with interest, is all to which in equity he is entitled.

The decree is affirmed, with costs.

MONTGOMERY, OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

BOARD OF EDUCATION OF CITY OF GRAND RAPIDS *v.* BROWN.

1. EMINENT DOMAIN—NECESSITY—EVIDENCE—DAMAGES.
   Evidence of the damaging effect of a proposed public improvement on any portion of the public is competent to affect the question of public necessity.

2. SAME—EVIDENCE.
   The admission of testimony tending to show damage from a public improvement to a portion of the public whose property is not to be taken for the improvement, is not error where the fact appeared from other competent testimony and from the view of the premises.

3. NEW TRIAL—REASONS FOR DENIAL—REQUEST FOR MORE SPECIFIC FINDING NECESSARY.
   In the absence of a request for more specific reasons for the denial of a motion for a new trial, a case which contains no prejudicial error will not be reversed on appeal for the reason that the lower court made a general finding that he found no grounds for awarding a new trial.

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4. SAME—MANDAMUS.

Quære—Is mandamus the proper remedy to compel the trial judge to file more specific reasons for denying a new trial?

Appeal from the superior court of Grand Rapids; Stuart, J. Submitted October 19, 1909. (Docket No. 122.) Decided December 10, 1909.

Proceedings by the board of education of the city of Grand Rapids against William B. Brown and Mattie Brown to condemn certain land for school purposes. From a judgment for defendants, petitioner appeals. Affirmed.

Moses Taggart and *Raymond M. Ferguson* (*Taggart & Taggart*, of counsel), for petitioner.

Kleinhans & Knappen, for defendants.

In 1907 the legislature passed an act conferring upon the board of education of the city of Grand Rapids authority and power to institute and maintain proceedings for the condemnation of private property for public use for schoolhouse sites, athletic grounds, and playgrounds, and for all purposes for which said board is authorized by law to acquire and hold property. Act No. 525, Local Acts 1907. Acting under this authority, the petitioner filed its petition in the proper court to condemn a small lot of land known as lot 8 of Briggs subdivision of lot 19, Coit & Curtis partition plat, of said city. A somewhat minute description of the property and its surroundings is essential to a proper understanding of the questions raised. The petitioner owns a schoolhouse site situated in the middle of a block, with a frontage upon the south along Fountain street 439.8 feet. On the west of said site is a school building now occupied as a grade school, but is eventually to be used as a gymnasium, in connection with a large high school building in the course of erection to the east, upon the other part of the site. The block in which this schoolhouse site is located is bounded on the west by North Prospect street, on the north by Lyon street, and on the

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east by North College avenue. A street named Lyon Place extends from Lyon street upon the north to the schoolhouse grounds, and over this street petitioner has access for all purposes. This street is located in the easterly part of said block, and enters the schoolhouse grounds 56.5 feet from its east boundary line. Briggs Court is located on the westerly part of said block, and is 57.3 feet from the westerly line of said schoolhouse site, prolongated north. Briggs Court is a paved street, is 30 feet wide, with a narrow sidewalk of about 3 feet on each side. The buildings are located close to the street line. The sidewalks and street are paved with concrete, and all the lots along it are occupied with houses except one. The lot in question is situated at the south end of Briggs Court, contains 150 square feet, rectangular on three sides, with a segment of a circle on the fourth. The object of the owner in platting this land and leaving the lot at the south end of the court as private property, was for the purpose of preventing its being extended through, thus making the court a *cul-de-sac*, attractive for residence purposes. The court has a water main and sewer. There are also water mains and sewers in Lyon Place, Fountain street, and North College avenue, and the other streets surrounding the block. The distance between the rear of the school buildings and the north line of the school grounds is about 30 feet.

The plat, introduced in evidence by petitioner, shows a public alley extending from the east side of the school site 142 feet north of Fountain street to North College avenue. Whether this is in fact a public alley cannot be determined from the record. If, however, it be a private alley, it extends to and opens into the school ground. The petition states "that it is necessary to take the said private property * * * for a schoolhouse site and grounds for the public use and benefit in said city of Grand Rapids." A large amount of testimony was taken. The jury viewed the premises and returned a verdict that the taking of this land "is not a necessary public improvement,

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and that it is not necessary to take and use the private property described in the petition for the use and benefit of the public for the proposed improvement in said petition described." The verdict was subsequently confirmed by the court, and from the verdict and confirmation the petitioner has appealed.

GRANT, J. (*after stating the facts*). 1. The first and most important assignment of error relates to the admission of testimony. The petitioner's right to condemn is based upon the testimony of one member of its board and other similar testimony. Mr. Sheppard testified on direct examination as follows:

"If the board of education owned lot 8, the advantage would be access for pupils from Lyon street and the streets west and north of Lyon street, more direct and quicker than going around by Prospect street. It would enable the board to have a water main directly across, connecting the mains in Lyon and Fountain streets by joining onto the main already in Briggs Court, a six-inch main, bringing the water supply between the two buildings, increasing the efficiency of the supply in both buildings, enabling us to divide the sewer service from the buildings, sending a portion through Briggs Court to Lyon and the rest to Fountain street. It would be advantageous to have all kinds of supplies enter at the rear, and to be able to pass in or along Briggs Court and out by the other court, whichever it might be, and it would be much simpler to pass in one street and out the other than to turn behind the building."

This same witness, upon cross-examination, said that, as far as outlets for teaming, water, and sewage, the same advantages could be obtained by other outlets, but at considerable more expense. These outlets were upon the school grounds and the streets already open to the petitioner.

Another of petitioner's witnesses, Mr. Barlow, testified, under direct examination, after being shown the sizes of the mains in Lyon Place, Lyon street, Fountain street, and Briggs Court, that he thought a connection with the

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water main and sewer in Briggs Court would be of advantage; and "it looks as though it would be a little handier for a good many of the children to come through Briggs Court." He also testified that without this piece of land the petitioner could get practically the same advantage by utilizing what they now have. This statement, of course, referred to water, sewage, and teaming. Evidence was given that it would be convenient to use a fire hydrant located near the south end of Briggs Court. The same witness, however, admitted that the hydrant could be placed without much expense upon the school grounds.

The city engineer, a witness for petitioner, testified that to carry a large sewer from Prospect street to the center of the school grounds, sufficient to take care of the sewage, would cost $994 in the street and $135 in the grounds. If from this arrangement the cost of the proposed improvement be deducted, the additional cost to the city would be small.

Several of the witnesses for petitioner admitted, on cross-examination, that the taking of this lot and its use for the purposes designed would be a damage to the property and residents on Briggs Court. The respondents offered similar testimony, which was received under objection and exception. This testimony was not admitted as affecting the question of damages, but as proper matter for the consideration of the jury in determining the public necessity which they must find before the land could be condemned. There was no claim on the part of respondents to recover any damages on this account. *Buhl* v. *Union Depot Co.*, 98 Mich. 596 (57 N. W. 829, 23 L. R. A. 392). It was admitted and submitted to the jury solely for its bearing upon the question of public necessity. Cases like *First Parish in Woburn* v. *County of Middlesex*, 7 Gray (Mass.), 106, do not apply. In that case a portion of the land surrounding a church, and belonging to it, was condemned for a public highway. The church and parish sought to recover damages for annoyance to

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its worshipers by the use of the highway from noisy and dissolute persons riding for pleasure on Sunday. It was held that damages for this anticipated annoyance could not be recovered.

The damaging effect of a public improvement upon any portion of the public is competent for the jury to consider in determining whether there is a public necessity for making the improvement. Otherwise, those whose property it seriously affected, but who cannot recover damages, must close their mouths and be subjected to damages without a hearing. The residents upon Briggs Court are a part of the public, and they are the part of the public most seriously affected by the proposed improvement. Why should it be held that the benefit and advantage to one portion of the public must alone be considered, and not the damage and disadvantage to another portion of the public? Suppose there are 500 school children who, by going through Briggs Court, would save travel of 200 to 300 feet, and there are 500 residents upon this narrow street with their dwellings upon the street line, are not the 500 residents as much a part of the public as the 500 children? Must a jury in condemnation proceedings consider only the advantage—if it is one—to the children, a part of the public, and not consider the disadvantageous effect upon the residents, the other part of the public interested? If, however, it should be held that this testimony was inadmissible, we think the case falls within *City of Detroit* v. *Brennan & Co.*, 93 Mich. 338 (53 N. W. 525), where it was held that the verdict in a street opening case should not be set aside because of the erroneous admission of testimony that could not have misled the jury. There was little occasion for much of the testimony on both sides. The jury viewed the premises, and had the surroundings before them. They knew, as well as any witness could tell, what convenience or benefit it would be to the school children to be allowed to come and go through Briggs Court. It is apparent that those coming from the east on Lyon street would not be benefited,

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and that those coming from the west on Lyon street cars could leave the cars at Lyon Place, and be nearer the schoolhouse than if they should leave the cars at North Prospect street, and go around to the front of the schoolhouse on Fountain street. In this event, they would have to walk no farther than if they could alight at Briggs Court, and walk through that street to the schoolhouse. The superintendent of the schools admitted that it would be no serious inconvenience to pupils to alight at North Prospect street and go around by Fountain street, 400 feet farther. Those who walked from the north and west would be compelled to walk the additional distance from Briggs Court to Lyon Place, 265 feet.

The jury had before them the sizes of the sewers and mains, the testimony of two engineers, and the facts in regard to the opportunity and ability of the petitioner to secure proper outlets without this improvement. It would seem that men of common sense needed no further testimony for their guidance than these facts, and their own view to determine whether this improvement was a public necessity. If there is any advantage to be obtained by connecting the water mains and sewers from the school buildings with those in Briggs Court, it seems apparent that that could be obtained without injury to the property or inhabitants of Briggs Court. All that would be necessary in that case would be to condemn a right of way under ground for the laying of the sewers and water mains. It also appears uncontradicted that the sewer in Briggs Court is not, in times of heavy rains, sufficient to carry off the water and sewage, and that at such times the water backs up into the cellars. Under these established facts, it would be a reflection upon the intelligence of the jury to hold that they were prejudiced by the testimony in support of the fact, patent to every one, that this proposed improvement would, if carried out, result in damage to the property and property owners on Briggs Court.

2. The errors assigned upon the refusal to give certain of petitioner's requests and upon the oral charge of the

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court relate to the admission of the evidence above stated. It is therefore unnecessary to discuss them. The court very clearly stated to the jury the claims of the petitioner and of the respondents, and, under proper instructions, left them to determine the question of public necessity and damages. We find no error in the refusal to give the instructions or in the charge as given.

3. Counsel for petitioner made a motion for a new trial for three reasons, as follows:

First. Because the verdict was against the legitimate testimony.

Second. Because it was against the great weight of the testimony.

Third. Because the court erred in its rulings and instructions to the jury, and the refusal to give petitioner's instructions, and the several rulings of the court adverse to petitioner upon the objections made upon the trial.

The court filed a decision saying that, "after due and careful consideration of all the matters set forth in said motion, I do not find any error in the proceedings as claimed in said petition, nor do I find any ground or reasons for awarding a new trial, and therefore a new trial is denied." To this finding counsel excepted for four reasons:

First. Because the motion was not granted.

Second. Because the court did not file specific reasons for its refusal.

Third. Because every point made as a basis for a new trial was not passed upon.

Fourth. Because the finding is a mere statement of the conclusion of the court.

If counsel desired a more specific finding, they should have made application to the court for that purpose. *Quære:* Would not mandamus in such case be the proper remedy? Appellate courts will not set aside a judgment and grant a new trial where no prejudicial error was committed upon the trial, because the judge has not filed a specific finding upon the motion for a new trial. The third reason why a new trial was asked is certainly as

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general as is the finding of the court. It included more than 20 objections. The decision of the court, however, fully notified counsel that the court overruled all their reasons for a new trial. The first and third reasons have already been disposed of above. As to the second, we are of the opinion that the weight of evidence was clearly with the respondent rather than with the petitioner. Petitioner's evidence made out a case of some convenience and some saving of expense rather than a case of public necessity, which the law requires in order to deprive a man of his estate.

The judgment is affirmed.

OSTRANDER, MOORE, and MCALVAY, JJ., concurred with GRANT, J.

MONTGOMERY, J. I concur in the result.

FORS *v.* FORS.

1. DEEDS—ALTERATION—QUESTION OF FACT.
   It is a question for the jury to determine whether or not an alteration was made in a deed which contained the interlineation of the letter "S" in the grantee's name and the abbreviation, "Jr.," after it, referring to defendant's son, and which the defendant claimed he told the notary to execute to himself as grantee; his testimony being contradicted.

2. TRIAL—INSTRUCTIONS—ABSTRACT STATEMENTS OF LAW.
   The trial court may properly refuse to give to the jury instructions upon abstract questions which could in no way aid the jury in coming to a conclusion as to the facts.

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3. SAME—INSTRUCTIONS TO JURY—INTIMATING OPINION OF JUDGE—PERJURY—ALTERATION OF DEED—NOTARY PUBLIC.

A charge which informs the jury that if a notary who testified in the case made certain alterations in a deed after its execution, he is guilty of forgery and perjury, erroneously emphasizes the opinion of the trial court upon a question of fact, and omits the theory that the notary might be mistaken in his recollection, or have believed he was entitled to change the instrument, or that he might have attempted to correct a supposed mistake in the conveyance.

Error to Houghton; Streeter, J. Submitted October 20, 1909. (Docket No. 126.) Decided December 10, 1909.

Ejectment by John S. Fors, Jr., and another against John S. Fors, Sr., and another. A judgment for plaintiff is reviewed by defendants on writ of error. Reversed.

John Kiiskila (*Burritt & Burritt*, of counsel), for appellants.

Hanchette & Lawton, for appellee.

MONTGOMERY, J. This is an action of ejectment to recover the east half of a village lot in the Hancock Copper Mining Company's addition to the village of Hancock. The plaintiff and the defendant John Samuel Fors are father and son.

It appears by the undisputed testimony that in 1900 Bernard Harris was the owner of the lot in question, and in April a contract had been made for the purchase of this lot. It is the claim of this defendant that this contract was made in his name. The defendant took possession of the lot on the 22d of May, made some improvements, and on the 4th of October, 1900, the parties met at the office of John Eichkern for the purpose of having the deed prepared. The plaintiff accompanied the defendant to this office, and the case centers upon what occurred at this office at this time. A deed was there prepared, and executed by Bernard Harris and wife;

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possession of it was taken by Mr. Eichkern, and he, accompanied by the plaintiff, went to the office of a building and loan association; a mortgage was executed, the sum of $600 received, brought back by Mr. Eichkern to his office, and paid over to Harris as the balance of the consideration price.

The deed contains two interlineations. Between the words "John" and "Fors" appears the letter "S.," and after the word "Fors" appears the abbreviation "Jr." The theory of the defendant is that these alterations were made after the deed was executed, signed, and delivered to Eichkern. The only support of this contention is the appearance of the deed and the testimony of the defendant as to the *res gestæ*. He testifies that when the parties were together in the office, the scrivener, Mr. Eichkern, asked in whose name the deed should be made, and that the plaintiff said that it should be made in defendant's name, and that the deed was thereupon drawn up and executed. This testimony is disputed. The circuit judge was evidently of the opinion, and we agree with that opinion, that there was enough to make an issue of fact upon this question.

Errors are relied upon which do not require discussion. The circuit judge very properly stated to the jury that the case must turn upon the simple question of fact as to whether the alterations made in the deed were made before or after it was signed and acknowledged before the notary public. This was the single question in the case, and it was not error to decline to give instructions upon abstract questions which could in no way aid the jury in coming to a conclusion as to the fact.

We are constrained to hold, however, that the circuit judge inadvertently indulged in language, in the course of the instruction, which was well calculated to impress upon the jury his own views of the evidence most forcibly. He instructed the jury as follows:

"Now, it has been very properly said by the attorney

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for the defendant that this is a very serious case, and, gentlemen, it is a very serious case for a reason which has not been pointed out to you at all in the argument of counsel. There is no question, under the testimony in this case, that different alterations were made in that deed by John J. Eichkern. They are not made by the plaintiff in this case at all. The testimony is absolutely without dispute. The alterations in the deed were made by John J. Eichkern. If he made these alterations after the deed was executed, he is guilty of forgery, and he ought to be in the penitentiary. If he made those alterations after the deed was executed, he is guilty of perjury on this stand, and ought to be in the penitentiary for that also. You are to consider these things in considering the question of when those alterations were made. They are in the case, and they are brought for your consideration."

The jury could not well fail to understand from this instruction what the views of the judge were upon the question of fact. Not only did he emphasize the fact that a verdict in favor of the defendant would seriously affect the witness Eichkern, but he excluded the theory of mistake on his part, either in his recollection or as to his right as a notary to alter the deed after it was executed. We can conceive of cases in which alterations might be made in a deed after it was executed, and the party not be guilty of technical forgery, if it was done for the purpose of correcting a supposed mistake. We are constrained to hold that this instruction was erroneous. See *Pokriefka* v. *Mackurat*, 91 Mich. 399 (51 N. W. 1059); *Sterling* v. *Callahan*, 94 Mich. 536 (54 N. W. 495); *Kelly* v. *Emery*, 75 Mich. 147 (42 N. W. 795); *Williams* v. *West Bay City*, 119 Mich. 395 (78 N. W. 328); and *Renaud* v. *Bay City*, 124 Mich. 29 (82 N. W. 617).

The judgment will be reversed, and a new trial ordered.

GRANT, OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

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CARTER *v.* REAUME.

1. VENDOR AND PURCHASER — DAMAGES — LAND CONTRACT — BREACH.

   In an action on a land contract brought by the vendor without a prior tender of a deed, the measure of damages is the difference between the purchase price payable under the contract and the value of the land at the time of the breach.

2. SAME — NOMINAL DAMAGES — SAVING QUESTIONS FOR REVIEW.

   A judgment for nominal damages will not be awarded on error in a case where the question was not presented to the trial court.

3. SAME — TAXES PAID — STATUTE OF LIMITATIONS.

   Separate items of taxes paid more than ten years prior to the commencement of the action, except in so far as they might be included in the total sum due, under a clause providing that they might be added thereto, are barred by the statute of limitations and are not recoverable as a part of the contract price unless a deed was tendered.

Error to Wayne; Brooke, J. Submitted October 20, 1909. (Docket No. 40.) Decided December 10, 1909.

Debt by Richard Carter against Frank C. Reaume, James H. Cody, Ralph B. Wilkinson, and others, for the amount of a land contract. A judgment for defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

James H. Pound, for appellant.

Navin, Sheahan & Bourke, for appellee Cody.

Edwin Henderson (*Wilkinson & Younglove*, of counsel), for appellee Wilkinson.

MONTGOMERY, J. This is an action of debt to recover an amount claimed to be due upon a land contract entered into between Martha F. Stewart and the three de-

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fendants Reaume, Lindsley, and Cody, which contract was afterwards assigned to defendants Radcliffe and Wilkinson, who assumed and agreed to carry out the terms; the original contracting parties not being released. One thousand dollars was paid upon the purchase price on the execution of the contract, and interest was kept up for some four years. The entire consideration reserved in the contract became due on the 18th of April, 1897. The contract was assigned by Martha F. Stewart to S. Wightman Stewart, and the property conveyed to him, and in 1900 the contract was assigned by S. Wightman Stewart to the plaintiff as security for $3,700. The plaintiff or his assignor has paid all the taxes accruing on the contract, both before and since the 18th of April, 1897.

This action was commenced just one day less than 10 years from the time the contract became due. In the court below the plaintiff claimed the sum of $13,303.12, being the entire amount due upon the contract, with interest thereon, and taxes paid. No tender of a deed was made to the defendants, and there was no direct proof that the plaintiff was in a position to tender a deed. The circuit judge was of the opinion that, under these circumstances, the plaintiff had not shown a right to recover, and directed a verdict for the defendants, basing his verdict upon the case of *Stewart* v. *McLaughlin's Estate*, 126 Mich. 1 (85 N. W. 266, 87 N. W. 218). The court stated:

"The plaintiff's claim was that the measure of damages was the whole amount due under the contract price, plus interest and taxes. No testimony was offered at the trial tending to show the value of the land to the vendor at the time the contract was broken."

The court held that the proper measure of damages would be the difference between the amount reserved in the contract and the value of the land at the time the contract was broken, and that, as there was no evidence on this point, the plaintiff could not recover. In this court

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the contention is made that at least nominal damages should have been allowed; but it is sufficient to say that no such contention was made in the court below, and that this point is also answered by *Stewart* v. *McLaughlin's Estate*, *supra*.

It is also claimed that the plaintiff should in any event be entitled to recover the amount paid for taxes. It was not claimed in the court below, so far as the record shows, that a recovery for these payments as distinct payments could be had; but we think a further answer to this claim is that, as to the taxes paid prior to maturity of the contract, the statute of limitations is pleaded and would be a complete answer to an action to recover for these separate items. The provision of the contract is that, upon failure of the purchaser to pay the taxes and insurance, the same may be added to the amount due on the contract payable forthwith, with interest at the rate of 8 per cent. per annum, and shall be treated as a part of the money payable under the contract. It is manifest that on the 18th of April, 1897, this contract matured, and all sums whatever unpaid which constituted a part of the contract price were due. The rights of the parties were then fixed. The plaintiff or his assignor were entitled to maintain an action in debt upon condition that a tender of conveyance should be made. So, when this action was brought, there was no obligation to pay any particular sum of money under a covenant which was independent of the obligation of the plaintiff to convey. The fact that some of the consideration consisted of taxes paid by the plaintiff or his assignor in no way affects this question. The amount so paid became a part of the purchase price or money payable under the contract. The plaintiff had the right to demand payment of all on this condition. By the express terms of the contract, the money paid by him for taxes became a part of the contract price. He sues in debt. He could hardly be permitted to recover piecemeal when all was due. The condition upon which he could recover what was due was, under the authority of *Stewart* v. *Mc-*

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Laughlin's Estate, that he should first tender a deed. Had the action been in assumpsit, or had there been evidence to show that land, the title to which is in the plaintiff, is of less value than the contract price remaining unpaid, there might have been some basis for a judgment; but on this record there is no such basis.

The judgment is affirmed.

GRANT, OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

MEILKE v. SCHABBLE.

1. EVIDENCE—ADMISSIONS—AGENCY.
   Testimony is competent to show that the plaintiff, after his colts were injured by defendant's dog, was refused permission to see the animal by defendant's servant in the presence of the defendant.

2. SAME.
   It was not prejudicial to admit evidence that the wife of defendant also refused to permit the plaintiff to see the dog.

3. SAME—IDENTITY.
   That there was no other dog of similar appearance in the vicinity is proper evidence to identify the defendant's animal.

4. PRINCIPAL AND AGENT—VICIOUS ANIMALS—SCIENTER—NOTICE TO AGENT.
   Notice of the vicious character of the defendant's dog may be imputed to the defendant from the fact that his servant, who had charge of and managed his farm, knew of attacks made by the dog on other persons and on animals in the highway.

5. ANIMALS—VICIOUS CHARACTER—KNOWLEDGE.
   An instruction to the jury was not error, that if they found the

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dog was of such vicious character that it might have been known by the defendant, had he exercised reasonable care and attention and should have known of its character, the jury might infer notice to him of its vicious propensities.

Error to Van Buren; Des Voignes, J. Submitted October 19, 1909. (Docket No. 105.) Decided December 10, 1909.

Case by Herman Meilke against August Schabble for injuries to plaintiff's colts caused by a vicious dog. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Barnard & Lewis, for appellant.

Cook & Chandler, for appellee.

MONTGOMERY, J. This action originated in justice's court, and was brought to recover damages for injuries to plaintiff's colts, caused by defendant's dog chasing said colts through a barbed-wire fence. The declaration was a common-law declaration. The circuit judge held that it was necessary to show the *scienter*. The plaintiff recovered a verdict for the damages to the colts, and the defendant brings error.

The assignments of error are nine in number. The first is based upon a ruling of the court admitting testimony that the plaintiff, after his colts were injured, went to the farm of the defendant and undertook to see the defendant's dog, and that he was refused the opportunity of doing so by Arnold Schabble; but, as it appears from the testimony that the defendant himself was present, and heard the conversation and the refusal of Arnold Schabble, we think this testimony was clearly competent. It is claimed in the brief that the defendant could not understand English, but there is testimony of witnesses that the defendant could understand a whole lot of English.

Error is also assigned upon a ruling admitting testimony to show that the plaintiff was refused by Mrs. Schabble the opportunity of seeing the dog. We think this could

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not have prejudiced the jury, and indeed was competent, if only for the purpose of showing the efforts made by the plaintiff to ascertain whether the dog in question was the one that caused the injury.

Error is assigned upon evidence given to show that there was no other dog of a similar appearance in the vicinity where this injury occurred. But this hardly needs discussion. It is referred to in the brief as negative testimony; but, if it were shown that the dog in question was the only bulldog owned in that township it would have some bearing upon the question.

The main contention of the defendant, as raised by his various assignments of error, is that error was committed by refusing to instruct the jury as requested, in substance, that if the facts tending to show the vicious character of the dog were communicated to Arnold Schabble, but he failed to communicate them to August Schabble, the defendant, that would not constitute knowledge on the part of the defendant, within the meaning of the law. A similar question was raised by an exception to an instruction given by the court, in substance, that if the attacks made by this dog upon persons in the highway, upon a cow of the witness Diefenbach, and upon other persons and stock, were brought home to the knowledge of Arnold Schabble, and if the jury found that he was an inmate of the household, and was managing and directing the farm, or if they found that the dog was of such a vicious character that such character might have been known by the defendant, had he exercised reasonable care and attention, and such that the defendant ought to have known of such character, then the jury had a right to infer that he did have notice of such vicious character. The claim of the defense in this respect is based upon the claim that there is no evidence of agency on the part of Arnold Schabble, and that the mere fact that he was the son of defendant, or a mere servant of defendant, and that the information was communicated to him, was not sufficient to charge the defendant with notice.

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The case relied upon be defendant is *Twigg* v. *Ryland*, 62 Md. 380 (50 Am. Rep. 226). That case states the rule contended for by defendant, with certain limitations. It makes for the rule that knowledge of a mere servant of the mischievous propensity of a dog is not sufficient to bring home knowledge to the defendant. But cases are also cited in the opinion which proceed upon the ground that, where the defendant had deputed to his coachman the care and control of the dog, notice to him of the vicious propensities or nature of the dog was notice to the master. And in the case of *Corliss* v. *Smith*, 53 Vt. 532, it was held that, where one employs an agent to control his farm and the property thereon, the agent's knowledge of the vicious habits of a dog owned and kept by the principal on the farm is the knowledge of the principal, and evidence which tends to show that the agent had such knowledge is admissible in an action against the principal for damages caused by the dog. The evidence in the present case we find clearly brings the case within this rule. There was testimony tending to show dealings with Arnold Schabble, by numerous of the neighbors, as the manager of the farm in question. There was testimony that, even when the plaintiff went to see defendant about the dog in question, Arnold Schabble, in the presence of the defendant, was the one who did the talking. There was at least enough testimony to carry the case to the jury tending to show the control and management of the farm in question by Arnold Schabble. This being so, the abstract proposition contended for that knowledge of a mere servant is not knowledge of a principal has no application. In view of this testimony the requests which were proffered by defendant were properly refused, and a careful scrutiny of the record fails to disclose any error in the submission of the case to the jury.

The judgment will be affirmed.

GRANT, OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

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SMITH v. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY.

1. ACTIONS—VENUE—PROCESS—SERVICE—LOCUS.
   As a general rule transitory actions must be brought in the county where service of process may be had, which is usually, although not necessarily, the county of residence of the defendant.

2. SAME—LOCUS OF ACTION—FOREIGN CORPORATIONS—TRANSITORY CAUSES—PLACE OF COMMENCEMENT.
   In the case of resident parties an action must be brought in the county where one of them resides, but where nonresidents are sued, the action lies in any county where process may be served. 3 Comp. Laws, § 10216.

3. SAME—NONRESIDENTS—FOREIGN CORPORATIONS—INSURANCE.
   Under 3 Comp. Laws, § 10015, regulating service of process on foreign insurance corporations, an action may be brought against such corporation in the county of plaintiff's residence, or in any county where service can be had upon a duly authorized agent of the defendant; the statute not being intended however to extend the jurisdiction so as to confer it upon any other court of the State.

Certiorari to Wayne; Murphy, J. Submitted October 22, 1909. (Docket No. 158.) Decided December 10, 1909.

Assumpsit by Richard W. Smith against the Provident Savings Life Assurance Society, principal defendant, and garnishment against the National Bank of Commerce of Detroit as garnishee. The defendant moved the court to quash the proceedings in the principal case. A judgment quashing the proceedings for want of jurisdiction is reviewed by plaintiff on writ of certiorari. Affirmed.

Arthur Jones, for appellant.

Gray & Gray (*H. E. Spalding*, of counsel), for appellees.

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MONTGOMERY, J. The plaintiff brought an action in the circuit court for the county of Wayne against the defendant life assurance society, and later instituted garnishee proceedings against the defendant, the National Bank of Commerce. These proceedings are not claimed to have any significance as to the question of jurisdiction which is here raised. In the case against the principal defendant suit was instituted by service of process upon the commissioner of insurance. The plaintiff at the time resided in the county of Manistee. The insurance company had an agent residing in the city of Grand Rapids, Kent county. The circuit court, on application of the defendant, dismissed the proceedings upon the ground that the court was without jurisdiction, because the plaintiff was a nonresident of the county of Wayne, and was a resident of the county of Manistee, and that the only process upon the principal defendant was the service of summons upon the commissioner of insurance of Lansing.

As a general rule, transitory actions must be brought in the county where service of process may be had, which is usually, although not necessarily, the county of residence of the defendant. In a case where residents of the State alone are concerned, the suit must be brought in the county of the residence of one or the other. See section 10216, 3 Comp. Laws, and *Haywood* v. *Johnson*, 41 Mich. 598 (2 N. W. 926). Proceedings against nonresidents, however, may be brought wherever service of process may be had upon them, without regard to the residence of the plaintiff. *Atkins* v. *Borstler*, 46 Mich. 552 (9 N. W. 850).

Plaintiff's counsel rely upon the statute providing for service upon insurance corporations. Section 10015 *et seq.*, 3 Comp. Laws. This statute provides that a foreign insurance company shall, as a condition precedent to doing business in the State, file a stipulation agreeing that any legal process affecting such company served on the insurance commissioner or his deputy shall have the same effect as if personally served upon the company or its au-

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thorized attorney in this State. The question presented is whether this statute is a modification of the rule of law previously existing, to the extent that it authorizes the bringing of a suit in any county in the State if service of process be had upon the commissioner. We do not so construe the statute. The general rule and statutes relating to service of process fix jurisdiction, and undoubtedly the action might be brought in the county of plaintiff's residence or in any county where service might be had upon a duly authorized agent of the defendant. But this statute is designed to avoid the necessity of such service, but was not intended to change the jurisdiction, and to confer it upon any court in the State. It should require very clear terms to indicate any such purpose, as the inconvenience in permitting a suit to be brought in a remote part of the State is manifest.

The circuit judge correctly interpreted the statute, and the judgment is affirmed.

GRANT, OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

CAMPAU v. NATIONAL FILM CO.

1. REFORMATION—LANDLORD AND TENANT—OFFICES—EQUITY.
   A lessee who deliberately signs a writing which restricts his use of rented premises to office purposes only, and prohibits the use for any business deemed extra hazardous on account of fire, when he was doubtful at the time whether it would permit him to conduct his business therein, and relied upon the unauthorized statement of the bookkeeper of the lessor that the lessor knew the intended purpose, and of the real estate

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agent conducting the negotiations, that there would be no trouble, is not entitled to reformation in equity upon a cross-bill claiming mistake or fraud.

2. SAME—PAROL EVIDENCE—RULE.
In such case the written instrument must prevail over prior oral agreements.

3. INJUNCTIONS—DISCRETIONARY NATURE OF WRIT.
The injunction, not being a writ of right, will be denied to a complainant who rented premises for the lessee's business, known to the lessor at the time, under the terms of a written lease which in effect prohibited the use of the premises for such business because of the increased hazard of fire.

4. SAME—INJURY RESULTING FROM ISSUANCE.
An injunction may be withheld if it is likely to inflict greater injury than the grievance complained of.

Cross-appeals from Wayne; Donovan, J. Submitted November 8, 1909. (Docket No. 147.) Decided December 10, 1909.

Bill by Daniel J. Campau against the National Film Company to restrain the use of leased premises contrary to the terms of the lease. From the decree rendered, both parties appeal. Reversed, and bill dismissed.

Hunt & Altland, for complainant.

Merriam, Yerkes & Simons, for defendant.

HOOKER, J. Complainant leased, by written lease, to the defendant, for the period of a year and 11 months, designated rooms in his building in Detroit. This controversy arises over the following provisions of the lease, *i. e.:*

"To be occupied for office purposes, and for no other purpose or purposes whatever, without the written consent of the party of the first part, and in no case to be used for any business deemed extra hazardous on account of fire."

The defendant entered, and is conducting the business of renting moving picture films, which involves their storage and repair, but not their manufacture.

The complainant asserts that such occupancy is not for

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"office purposes only," and also that it is a business "deemed extra hazardous, inasmuch as the films are made of inflammable material, viz., celluloid." He has filed the bill in this cause to restrain such use of the premises. Defendant's answer asks affirmative relief in the way of reformation of the contract to conform to the alleged understanding and oral agreement of the parties, that he might conduct this business upon the premises if the contract as written shall be construed to exclude it. The evidence shows that this lease was signed by the defendant with the full knowledge of its provisions. After the parol arrangement for the lease was concluded, complainant caused the lease to be written, signed it, and left it with his bookkeeper to secure the signature of the defendant. On presentation the latter's manager read it, noticed the provision quoted, and "objected to signing it on that point," when Mr. Stevenson, a real estate agent through whom the arrangements were brought about, said to the bookkeeper, "Is not this question thoroughly understood with Mr. Campau what these premises should be occupied for?" and he (the bookkeeper) said it was, and that "there was not any question about it." Defendant manager still being unwilling to sign the lease, Stevenson says: "I told him, from what I knew of Mr. Campau—I didn't know him very well—(Objected to.) He signed it when I was in there."

Under the well-settled rule, defendant cannot be allowed to alter or vary the writing that he deliberately signed, by proof of conversations or oral agreements had or made prior thereto. The claim that the contract should be changed upon the ground of fraud or mistake is untenable. Defendant's manager deliberately signed the writing with full knowledge of its provision, with doubts of its sufficiency to cover the business contemplated upon a bare assurance of the bookkeeper (who is not shown to have had authority to give it) that Campau understood the purpose for which defendant rented the place, and Stevenson's assertion (if it can be called such) that there

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would be no trouble about it. The defendant's claim to a reformation must be denied.

We are of the opinion, however, that the evidence shows that the complainant understood the purpose for which the defendant intended to occupy these premises, and made no objection until after the lease was executed, and the defendant had been to expense in moving his business. He knew that the basement was rented because it had commodious fire-proof vaults, which defendant intended to use for the storage of films. He testified that he supposed that the office would be used for the exhibition to defendant's customers of films in two machines which he (complainant) understood were to be used for that purpose. While we are not satisfied that the business carried on was a use of the premises for "office purposes only" or that the business was not within the term "extra hazardous" (which we find it unnecessary to determine), we think that complainant is not entitled to the relief he asks for several reasons. The bill is filed for an injunction to restrain defendant from conducting a business of keeping or storing films upon the premises. This is unconscionable under the proof, for, under complainant's theory, the defendant must not only forego the benefit of his lease, but must continue paying a rental of $1,200 per year for the premises. It cannot even sublet or assign its lease without written consent of the complainant. Relief by injunction is not a matter of right in a case like this. It rests in discretion.

"It is not enough to show that defendant is without right. The complainant who seeks equity must do equity, and must affirmatively show himself to be equitably entitled to the relief asked." 22 Cyc. p. 776, and cases cited."

That is the general rule in all equity cases, and there is no reason for relieving a complainant from it in a case where he asks the drastic relief of an injunction. We applied this rule in the case of *Edwards* v. *Mining Co.*, 38 Mich. 46 (31 Am. Rep. 301), where we held that—

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"Injunctions are to prevent irreparable mischief and stay consequences that could not be adequately compensated. Their allowance is discretionary, and not of right, calls for good faith in the petitioner, and may be withheld if likely to inflict greater injury than the grievance complained of."

Again, we said in that case that:

"Where, by inviting an injury, one places himself in a position to call for an equitable remedy, his motives can be inquired into, even though he grounds himself on strict legal right."

See, also, *Turner* v. *Hart*, 71 Mich. 128 (38 N. W. 890, 15 Am. St. Rep. 243).

The proof in this cause, as we interpret it, also shows that the danger from fire arising from the business as conducted is comparatively small when measured by the increased insurance rates chargeable to its presence, while the precautions taken by the defendant minimize the actual hazard, and the rapid substitution of noninflammable films promises still further reduction of the danger. We have already adverted to the injury to the defendant if denied the privileges for which he rented the building, and is still compelled to pay rent. The following authorities are in point on this branch of the case: *McBryde* v. *Sayre*, 86 Ala. 458 (5 South. 791, 3 L. R. A. 861); *Trustees of Columbia College* v. *Thacher*, 87 N. Y. 311 (41 Am. Rep. 365); *Starkie* v. *Richmond*, 155 Mass. 188 (29 N. E. 770); *Clarke* v. *Clark*, L. R. 1 Ch. App. Cas. 16; *Durell* v. *Pritchard*, L. R. 1 Ch. App. Cas. 251; *Edwards* v. *Mining Co.*, 38 Mich. 46 (31 Am. Rep. 301); *Hall* v. *Rood*, 40 Mich. 46 (29 Am. Rep. 528); *Potter* v. *Railway*, 83 Mich. 297 (47 N. W. 217, 10 L. R. A. 176); 3 Pomeroy on Equity Jurisprudence (3d Ed.), § 1295, note.

The learned circuit judge who heard this cause was apparently convinced of the hardship and injustice of complainant's claim, and required his consent to a surrender of the lease by defendant as a condition of relief. We think that this was well within, and a conservative

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exercise of, his authority, and more than complainant was justly entitled to, for it imposed costs upon the defendant, and, as both parties have appealed, there is no obstacle to doing full justice to the defendant in this court by dismissing the bill with costs of both courts, leaving complainant to his remedy at law, if upon a trial it shall be found that defendant's business as conducted is prohibited by the lease, a question we do not determine.

The bill is dismissed, with costs of both courts.

BLAIR, MONTGOMERY, OSTRANDER, and BROOKE, JJ., concurred.

WATSON *v.* E. E. NAUGLE TIE CO.

1. SALES—BREACH—CONTRACTS—RESCISSION FOR FAILURE TO PERFORM.

   After the constructive delivery of timber from seller to buyer, the defendant having failed to pay for it and a suggestion being made that a new contract be executed to meet the situation, the parties failed to come to an adjustment, and the letters between them including their negotiations are *held* not to amount to a rescission of the original contract by plaintiff.

2. SAME—FAILURE TO PAY PRICE—RESCISSION.

   Rescission of a contract of sale is not shown by testimony that the seller demanded that defendant either pay for or release the timber, and the latter's agent stated they would see about it, and the seller could not get them to release the property, but that the defendant later informed a prospective purchaser of the timber that he might take it and that the defendant made no claim to it.

Error to Chippewa; Steere, J. Submitted November 9, 1909. (Docket No. 179.) Decided December 10, 1909.

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Assumpsit by Thomas H. Watson against the E. E. Naugle Tie Company for goods sold and delivered. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Horace M. Oren, for appellant.

Davidson & Hudson, for appellee.

HOOKER, J. A former judgment for the plaintiff in this cause was reversed for the reason that the circuit judge had directed a verdict for the price of certain ties and posts, designated as the McInnis timber and Demerest timber, instead of leaving to the jury the question whether there had been a surrender or discharge of the contract as to the ties and posts. See 148 Mich. 675 (112 N. W. 752). He did leave that question to the jury as to poles. Defendant afterwards was permitted to make certain amendments to his plea, and the cause was tried again; plaintiff recovering upon his claim relating to the McInnis timber. Defendant has again appealed, and the only question before us is whether the court erred in declining to direct a verdict for defendant.

Nothing but the McInnis timber is involved upon this record. Among the amendments to the plea was the following, viz.:

"Even though as respects said items there had been an acceptance thereof by, and constructive delivery thereof to, the defendant whereby title had become vested in defendant, yet that prior to the taking of actual possession thereof by defendant, and before payment of the purchase price or any portion thereof by defendant, the plaintiff rescinded the contract for the sale and purchase of each and all of said items and retook the same from the constructive possession of said defendant, and thereby barred himself from recovery for said items in his said suit."

Defendant's points are stated in his brief:

"Rescission or discharge of the original contract, as respects the McInnis timber, was affected by a subsequent

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written contract between plaintiff and defendant, and the jury should have been so charged and verdict directed. * * *

"Rescission or discharge of the original contract as respects the McInnis timber was later again effected by a parol executed contract, the facts and terms of which were undisputed, and the effect of which should have been declared by the court in directing a verdict of no cause of action for the timber in question."

1. Was the contract rescinded by plaintiff in writing? Counsel for the defendant concede that the title to the timber in controversy had vested in the defendant, and that it bore defendant's mark. It should have been shipped before August 16, 1903, but defendant had failed to furnish a vessel to carry the same. An inspection of this timber had proven unsatisfactory and had been canceled by mutual consent, and it had been agreed that it should be again inspected when it should be loaded, though this probably involved merely a recount of poles.

On October 16th plaintiff wrote defendant as follows:

"DE TOUR, MICH., October 16, 1903.
"E. E. NAUGLE TIE CO.,
"CHICAGO, ILL.

"*Gents:* Not receiving any reply to my letter of 10th, would now ask that you accept the balance of my timber on the shore where it now lies and pay for same, I having fulfilled my part of the contract, and it would not be reasonable for you to expect me to pay double price for trying to load this now. Water is cold and men scarce, everything will be to disadvantage as you know through no fault of mine, as I stood ready to load at any time, and have repeatedly requested you to send boats. What I now ask is that you instruct your Mr. Jacobi to inspect and pay for on the beach and settle up in full, so that I can commence this winter's operations as everything (as far as timber is concerned) is virtually tied up pending a settlement of last winter's work. People I bought off last winter are ready to contract and go into camp, but will not until last winter's work has been straightened up and as there is other buyers on the ground this year it makes it more binding to be ready to do business at any time the

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camp men are, so hoping you will give this your immediate attention and greatly oblige,

"Yours truly,

"T. H. WATSON."

Advancements had been made on all timber furnished, and on November 17th, 25th, and 27th plaintiff made statements of account, which admittedly charged defendant only with timber taken away by it, and applied by way of credit upon the same all advancements. We understand that defendant claims for this only that it left the matter in a situation that gave the plaintiff the right to rescind the contract as to this timber. That may perhaps be safely conceded, but it still leaves the question "whether he did rescind." On November 25th defendant wrote, as follows:

"I was taking with Mr. Willson about your account when he was in Chicago Monday, and we both want to get it in proper shape at the earliest possible moment, and Mr. Willson agreed with me that he would send an inspector to tally up the balance of the material we bought from you, and he is in Alpena today, and I think he will be in the Soo, Michigan, within two or three days, and you can either telephone him, or arrange the details by addressing him, care Iroquois Hotel.

"Yours truly,

"E. E. NAUGLE, President."

2—Dic. E. E. N.

Mr. Dean was sent to inspect this timber, but did not succeed in doing so. Defendant's letter of December 29th shows this:

"Mr. T. H. WATSON,

"De Tour, Mich.

"*Dear Sir:* Your letter addressed to me at the Soo has reached me. Mr. Dean told me that it was impossible to cross Drummond Island at the time he left there and I have not heard that there is a safe crossing yet, although there may be now. He also told me that he saw several of your operators on the island and that they told him it was impossible to tally and inspect the poles as they were piled upon the island at this time of the year,

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therefore I did not send him back there. * * * If it is true that the material cannot be inspected and tallied now, the only way that I know to handle the posts and poles that are still on the island would be to make a new contract for a specified amount of poles of certain lengths and sizes, to be delivered the first thing in the spring and to make such payments upon them as we might mutually agree upon. This, however, is only a suggestion, and I should be glad to hear from you upon it."

It is evident that there had been no claim of rescission up to this time. Plaintiff wrote in answer:

"Mr. GEO. WILLSON,
"Sault Ste. Marie, Mich.

"*Dear Sir:* Replying to yours of 29th will say regarding your suggestion relative to all of my timber not being loaded, this I know was all loaded and I have Mr. Jacobi's tally of same. The boats that Mr. Jacobi was not present at the loading I had copy of and Mr. Dean together with myself compared your Chicago inspection with our copy and they compare within a trifle and when your Mr. Jacobi brought in his tally of the other cargoes I paid my men that got this timber out accordingly and now I must have a settlement for same. I have waited and done without my money now for a year and now must insist on a settlement in full if not I shall proceed at once to enter suit. As for your Mr. Dean not going over to the island to count up, that does not annoy me, as the timber is worth the money where it is. I care nothing about what you did not take, it is what you have got I want pay for."

Does this correspondence conclusively constitute a rescission? We think not. The defendant was careful to make "only a suggestion of a new contract." The plaintiff declined to discuss the matter, merely saying "that did not annoy him." The court properly refused to take this question from the jury.

2. Was there a subsequent oral rescission? During the following spring Watson met Willson at the Soo, and made a demand that defendant either pay for or release this timber. O'Dell, a member of the defendant, was with Willson. After a conference, Watson says that the answer made was, "We will see about it." There was

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testimony that plaintiff had made a contract for other timber to be cut with one Gilpin, and that he was willing to receive this lumber upon it. Watson says he went to the Soo to get them to release it and take their mark off, but got no satisfaction, and went home. He heard no more from them, but it appears that a few weeks later Willson told Gilpin that defendant did not claim the poles, and that he, Gilpin, was at perfect liberty to take them if he wished. He did not take them, however. We are of the opinion that this should be considered neither a readjustment nor a rescission. It was an offer to defendant which, had it been accepted at the time, would have relieved it from liability, but there is nothing to indicate that it was a standing offer, or that plaintiff understood at the termination of the interview that he had released or settled his claim. The testimony shows clearly that defendants did not perform their contract, that plaintiff never released them, and, while he offered to defendant an alternative for full performance, it was not accepted, and there is no ground for holding that the offer should be considered tantamount to a rescission or to an agreement which would have the effect of revesting title in plaintiff and relieving defendant of its obligation to perform its contract.

The judgment is affirmed.

BLAIR, C. J., and MONTGOMERY, OSTRANDER, and BROOKE, JJ., concurred.

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WEESSIES v. VAN DYKE'S ESTATE.

APPEAL OF HOEK.

1. ESTATES OF DECEDENTS—EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF CLAIMS—SERVICES OF MEMBER OF FAMILY.

   The presumption of law that services rendered by a member of decedent's family were rendered gratuitously for the common benefit, does not bar a claim by a son-in-law for board furnished his wife's deceased father, who lived in a separate home on the premises, if the jury find that the parties understood that compensation should be made.[1]

2. WITNESSES—COMPETENCY—STATUTES—FACTS EQUALLY WITHIN KNOWLEDGE OF DECEASED.

   The claimant's wife who cooked food for her father and assisted in caring for him is not an agent of the claimant in making or continuing the contract, under Act No. 80, Pub. Acts 1903, which excludes the testimony of the agent.

Error to Kalamazoo; Knappen, J. Submitted November 8, 1909. (Docket No. 178.) Decided December 10, 1909.

Harm Weessies presented a claim against the estate of Harm Van Dyke, deceased, for services rendered. The claim was allowed in part by the commissioners, and Walter Hoek, executor, appealed to the circuit court. A judgment for contestant on a verdict directed by the court is reviewed by claimant on writ of error. Reversed.

Osborn & Mills, for appellant.

John J. Hollander, for appellee.

OSTRANDER, J. Appellant presented the following claim against the estate of Harm Van Dyke, deceased:

[1] As to implied contract to pay for services to relative not living as part of same family, see note to *Mark* v. *Boardman* (Ky.), 1 L. R. A. (N. S.) 819.

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"For board, washing, care, etc., of Harm Van Dyke, six years preceding his decease, at $4		$1,248 00
"For extra services and care of said Harm Van Dyke during the last year of his life, after he was stricken with paralysis, and during his last sickness		104 00
"For rent of lot, taxes, and insurance paid and incurred for Harm Van Dyke during the last six years of his life		150 00
		$1,502 00"

The commissioners on claims allowed the sum of $1,000. The executor, upon the demand of a legatee, took an appeal to the circuit court, where a verdict for the estate was directed. A motion for a new trial was made, and was denied, whereupon a judgment was entered upon the verdict with the direction to certify the same to the probate court. The principal question presented is whether there was testimony from which the jury might have found that the deceased expressly or impliedly contracted to pay for services and for board and washing furnished by the appellant during the six years preceding his death. Harm Van Dyke died November 28, 1906, at the age of 89 years. Appellant is his son-in-law—the husband of his daughter. The testimony tends to prove that for 20 years prior to his death Harm Van Dyke lived alone in a small two-room house which he had built with his own money on the lot belonging to the appellant, only about four or five feet from the house of the appellant. Prior to that time, he had for some years been a member of the family of the appellant, living in the house with his daughter and her husband. For a while after he built his house he took his meals at the house of appellant, but because he did not agree with a hired man, and because he was annoyed by appellant's children, he withdrew himself. Thereafter meals were taken by appellant, his wife, or their children to his cottage, and there the deceased was cared for during his life and during his last illness by appellant and his wife, assisted to some extent during his last sickness by

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the neighbors. The deceased bought his fuel, hired his washing done when the wife of appellant was unable to do it, and bought for himself some minor supplies, such as tea, sugar, tobacco, bread, and eggs. At times, but not for seven or eight years before his death, he worked for appellant, and was paid wages without deduction for his board or care. He was possessed of some money invested at interest. He left a will, which was probated, in which he disposed of his property to persons other than the appellant and his wife. He makes reference to them in the third item of his will, which reads as follows:

"To my children, William Van Dyke and Mrs. Harm Weessies, I leave nothing, because for a long time they have been very unkind to me. I have thought this matter over carefully and feel that they deserve no part or portion of my property."

This will was made July 14, 1900. It is the testimony of appellant's wife that some 16 or 18 years before his death appellant told the deceased that he was not able to care for him unless he paid something for his board; that the deceased, without saying very much, did say that he was able to pay for everything he got. Upon another occasion, when appellant's wife carried a meal to him at his house, he gave her 75 cents, and said: "Here is your board." She took it and gave it to her husband. He asked her what it was for and she said: "Board from father." Appellant said: "You take that back, and tell him I don't want that. That ain't enough." She did so. Decedent took the money, and put it in his pocketbook, saying nothing. This occurred some 12 or 13 years before his death. The executor of the estate, who was also made a legatee, testified that decedent came to him one day, and wanted to know how much appellant owed in the way of a mortgage, was told that he could not tell him, when he went away. The next day he came again, repeated the inquiry, and was told to go to Mr. Osborn who had charge of the mortgages, and he could tell him about it. Mr. James W. Osborn testified that some time

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in 1901 or 1902 (it will be noticed that this was after the decedent had made his will) decedent came to his office and inquired if there were any mortgages there against appellant, was asked why he wanted to know, and said that Walter Hoek (his executor) sent him there.

"He said that he had lived in with Weessies for years, and that he wished to pay him for it, and it was with a view of ascertaining what Weessies owed that he wished to provide for—to assist Weessies. He said that Weessies was a man in poor health, that they had much sickness, and that Weessies was not as strong a man as he was when he was young. I then took the mortgages and prepared a statement of the amount that was owing on them. * * * I showed the mortgages to Mr. Van Dyke. * * * He had the amount of these mortgages; the balance of interest computed up to that time. I handed that to the old gentleman because he told me what use he desired to make of it. He said that he had boarded there, and that he wanted to pay them."

I have here set out, in substance, the testimony and the circumstances relied upon by the appellant. He never presented a bill to deceased, or, so far as is disclosed, asked him to pay or asserted a claim. Deceased never paid him anything. It is clear that the deceased and the appellant and his wife were not for many years living together as a family, receiving mutual benefit and comfort from property which they enjoyed in common. On the contrary, deceased had withdrawn himself from the family, and, while he lived upon the immediate premises, and so close to the house of appellant that, when it was necessary, he could, as he did, attract attention by rapping on the window of his own house, he lived separate and was furnished his meals, and accepted the care and attention of appellant and his wife and children in his separate domicile. The law will not imply from the discharge by a child of a purely filial duty an obligation of the parent to pay for the service. And, when the family relation exists, much which is done for and furnished to a member of the family by another or by other members is presumed

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to be gratuitously done or furnished. It is the relation, and the presumption arising therefrom, which is held to negative the existence of an implied contract to pay for what is accepted. See *Decker* v. *Kanous' Estate*, 129 Mich. 146 (88 N. W. 398), and cases referred to in the opinion; *In re Colburn's Estate*, 153 Mich. 206 (116 N. W. 986, 126 Am. St. Rep. 479); *Hialey* v. *Hialey's Estate*, 157 Mich. 45 (121 N. W. 465). But, under the circumstances disclosed by this record, there is, in my opinion, no conclusive presumption that the appellant was furnishing deceased his board gratuitously. It became a question of fact whether deceased and appellant understood that compensation was to be made. *Ashley* v. *Smith's Estate*, 152 Mich. 197 (115 N. W. 1052). It may be that some distinction should be made between the items set forth in the account presented against the estate —between the cost of the sustenance actually furnished to, and accepted by, deceased at the expense of claimant and some of the care bestowed by his wife, the daughter of deceased, upon her father. As a new trial must be had, it is unnecessary to anticipate the instructions proper to be given upon this subject.

It is contended that by the provisions of Act No. 30, Pub. Acts 1903, the testimony of claimant's wife was incompetent. The provision relied upon is understood to be the following:

"No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness in any suit involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract," etc.

There is nothing in the record tending to prove that the wife or claimant acted in any capacity in making or continuing a contract with the deceased. She overheard a conversation between the parties and testified to it. She carried money and a message from her father to her husband, and returned the money and a message to her father.

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She testified to the occurrence. The fact that she may have cooked some or all of the food furnished by her husband and delivered some or all of it to her father does not constitute her the agent of her husband within the meaning of this statute.

The judgment of the circuit court is reversed, and a new trial granted, with costs against the estate.

BLAIR, C. J., MONTGOMERY, HOOKER, and BROOKE, JJ., concurred.

PEOPLE v. ANDERSON.

INTOXICATING LIQUORS—CRIMINAL LAW—BEER.

Testimony that a witness purchased beer of the respondent in a local-option county, warrants a conviction without proof of its intoxicating qualities.

Error to Wexford; Chittenden, J. Submitted November 12, 1909. (Docket No. 163.) Decided December 10, 1909.

Norman B. Anderson was convicted of violating the local-option law. Affirmed.

D. E. McIntyre, for appellant.

William H. Yearnd, Prosecuting Attorney, for the people.

BROOKE, J. Respondent was convicted of an alleged

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violation of the local-option law. The information charged that on May 11, 1908, he sold and furnished to one Frank Wrigglesworth a certain quantity of malt, brewed, fermented, spirituous, and intoxicating liquor, to wit, 36 pint bottles of beer. Wrigglesworth testified that he bought a case of beer from the firm of Stewart & Anderson, and that he paid Anderson $2.50 for it. He could not recall the date, but testified that he got the beer in the alley by the storehouse of Stewart & Anderson. "I understood that was where I would find it. It was after 8 o'clock when I got the beer." James Dolan, a patrolman of the city of Cadillac, testified that on May 11, 1908, at about 8 o'clock in the evening, he saw Wrigglesworth drive up to the storehouse of Stewart & Anderson, and put a case of some kind into his hack, and drive away.

Respondent was not sworn, nor was any testimony given in his behalf. In this court respondent contends that his conviction should be set aside, because there is no testimony that a sale was made of "malt, brewed, fermented, spirituous and intoxicating liquor;" the word "beer," used by Wrigglesworth in his testimony, not necessarily importing any of the qualities of the prohibited liquor. Upon this point the authorities are not agreed, but we think the weight of authority is against the contention of respondent. *U. S.* v. *Ducournau*, 54 Fed. 138; *Snider* v. *State*, 81 Ga. 755 (7 S. E. 631, 12 Am. St. Rep. 350); *Welsh* v. *State*, 126 Ind. 71 (25 N. E. 883, 9 L. R. A. 664); *State* v. *Teissedre*, 30 Kan. 477 (2 Pac. 108, 650); *State* v. *Tisdale*, 54 Minn. 105 (55 N. W. 903); *State* v. *Effinger*, 44 Mo. App. 81; *Kerkow* v. *Bauer*, 15 Neb. 150 (18 N. W. 27); *Murphy* v. *Inhabitants of Montclair*, 39 N. J. Law, 673; *Whitcomb* v. *State*, 2 Tex. Civ. App. 301 (21 S. W. 976); *Briffitt* v. *State*, 58 Wis. 39 (16 N. W. 39, 46 Am. Rep. 621); *State* v. *Spiers*, 103 Iowa, 711 (73 N. W. 343). See Black on Intoxicating Liquors, § 17, and cases cited. The sale of beer by the respondent having been proven, it was competent for him to show

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that it was not intoxicating, but he must show it, if he relies upon it as a defense.

The other assignment of error has been considered, but no discussion of it is deemed necessary.

The judgment is affirmed.

BLAIR, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

O'TOOLE v. OHIO GERMAN FIRE INSURANCE CO.

1. INSURANCE—DEFENSES, NOTICE OF—AMENDMENT.
   The refusal of the trial court to permit, after the closing of plaintiff's evidence, an amendment of the plea and notice of defense, so as to set up the defense of change of title in plaintiff, is discretionary.

2. SAME—HEARSAY—SELF-SERVING DECLARATIONS.
   Evidence in rebuttal that plaintiff, before being accused of any offense, called up the sheriff by telephone and urged him to investigate the fire, is competent to disprove her guilt.

3. EVIDENCE—HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS.
   Letters of a wife to her husband containing confidential communications are admissible as evidence tending to show that she destroyed insured property by fire, where they came into the possession of third persons, without collusion, by finding. 3 Comp. Laws, § 10213.

4. INSURANCE — TITLE — CHANGE OF OWNERSHIP — EFFECT OF ATTACHMENT.
   The levy of an attachment on insured property, without the knowledge of the owner, subsequent to the issuance of the policy, is insufficient to avoid the policy.

5. APPEAL AND ERROR—ASSIGNMENTS OF ERROR.
   An assignment of error that the court erred in failing to submit to the jury the question of waiver of defenses is too general to be considered on appeal.

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Error to Lenawee; Chester, J. Submitted November 11, 1909. (Docket No. 82.) Decided December 10, 1909.

Assumpsit by Myrtle E. O'Toole against the Ohio German Fire Insurance Company on a policy of insurance. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

Bird & Sampson, for appellant.

D. B. Morgan and *Smith, Baldwin & Alexander*, for appellee.

OSTRANDER, J. The policy of insurance sued upon—a Michigan standard form—is dated November 12, 1904. The barn, a portion of the property insured, burned November 5, 1906. This suit was begun by summons April 2, 1907; the declaration being filed April 10, 1907. The trial began February 7, 1908. With its plea the defendant gave notice that it would rely upon a number of the conditions, violations of which would avoid the policy, among them the one relating to a change other than by death of the insured in the interest, title, or possession of the subject of insurance. The specification in this behalf was that upon a day named a writ of attachment had been levied upon the property. It also gave notice that it would show (I omit the verbiage) that plaintiff fired the barn, or caused it to be fired, with intent to defraud the defendant. The assignments of error relied upon will be referred to in the order in which they are presented in the brief for appellant.

1. It appeared at the trial that, when the policy was issued, plaintiff represented that she was sole owner of the property, when, in fact, it was owned by herself and her husband by entireties; that, the fact being discovered, a rider was placed upon the policy correctly stating the title. About a year before the fire plaintiff again became of record the sole owner of the legal title, a fact not discovered by defendant until the trial had begun. After

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plaintiff's case was closed, the court was moved to permit defendant to amend the notice so as to set up specifically the change in the title last above mentioned. The motion was denied, and error is assigned upon the ruling. The proofs of loss contained the statement that the interest of plaintiff in the destroyed property was a total interest, except as to the interest of a certain mortgagee. The statement of counsel to the trial court was that the change of ownership was first discovered from an examination of the records of title made after the trial was begun. The ruling of the court is sustained upon the authority of *First Baptist Church of Jackson* v. *Insurance Co.*, 119 Mich. 203 (77 N. W. 702).

2. The second and third assignments of error are based upon rulings which permitted two witnesses for the plaintiff, who in the order of proof preceded her, to detail certain statements made by plaintiff. To one of the witnesses her statement, made by telephone, was directed. The other heard her talking at the telephone. Neither witness was incompetent to testify to what they heard plaintiff say. What she said, in their presence, was a fact within their knowledge. It is said that the effect of the rulings was to bring to the attention of the jury self-serving statements of the plaintiff. The fact is that she called the office of the sheriff, and said, in substance, that she would like to have the matter of the fire investigated, that there were suspicious circumstances connected with the burning of the barn. The evidential fact sought to be proved was that plaintiff invited an investigation—set one on foot, or sought to do so, the inference being that such conduct was inconsistent with guilty knowledge. The particular act of telephoning and the utterances accompanying it were relevant because the defendant in its notice had informed plaintiff that she was charged, either as principal or as accessory, with burning the insured barn. The testimony for defendant had been concluded. The conduct of plaintiff, her acts and declarations before and after the fire, supposed to be favorable to the theory

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of defendant, had been brought to the attention of the jury, including statements which were interpreted as declarations that she intended to burn the barn. The particular conduct and utterances of plaintiff occurring at a time before she had been charged with setting the fire, whether making for her innocence or her guilt, were relevant, and no reason is perceived for excluding them.

3. Two letters and the accompanying envelopes were produced by the defendant, offered in evidence, and excluded upon the objection and ground that they were privileged communications. The letters were communications made by the wife to, and received by, the husband. They were read into the record, and, aside from any presumption, should be regarded as confidential communications. See 4 Wigmore on Evidence, § 2336. Testimony was introduced tending to prove that the letters were found in a room temporarily occupied by the husband, under circumstances indicating that they had escaped from his clothing to the floor of the room. The person who found them occupied no fiduciary or other confidential relation to either spouse. It is not claimed, and there appears to be no foundation for such a claim, that there was collusion between the husband and the one who found them, or between the husband and the defendant. From the finder, but indirectly, they came into the possession of the defendant. They contain relevant and material, if competent, testimony in the nature of admissions of the plaintiff. We need not discuss the proposition advanced by appellant, that the statute privilege should be held to be waived or withdrawn in cases where the communications relate to a projected fraud or crime, to be committed or participated in by one or both of the spouses. See Appleton on Evidence, p. 167. Assuming, but not deciding, that in a proper case the rule contended for ought to be applied, inspection of these letters does not condemn them as within the rule. It is when they are read in the light of many circumstances which they do not disclose or refer to that they take on the character ascribed to them by coun-

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sel, and then only as one may find the truth of many other alleged facts to be. In determining the correctness of the ruling of the trial court, we must consider the letters as confidential communications from a wife to her husband, concerning which he could not be examined without her consent and his own, which judicial process would not compel him to produce in evidence against or for her or himself. It is manifest, and has already been indicated, that the sole reason which is or can be adduced for receiving the letters in evidence is the one that because the letters were lost by the husband and were found by a stranger, who thus became possessed, and through whom defendant became possessed of the original documents of communication, there has also been lost, not the confidential character of the utterances, but the common-law and statute privilege of the parties to the communications. There are adjudications, notably *Mercer* v. *State*, 40 Fla. 216 (24 South. 154, 74 Am. St. Rep. 135), which appear to proceed upon the theory that such a communication is not competent evidence, is "privileged from exposure in evidence in and of itself, regardless of the custody from which it was produced at the trial." The manner in which the letters there considered came into the possession of the prosecution was not disclosed. In *Liggett* v. *Glenn*, 51 Fed. 381 (2 C. C. A. 286), the privilege of a client with respect to communications made to his attorney was involved. A certain document of agreement between counsel and clients was filed by the attorney in probate court in support of a claim for services made upon the estate of a deceased client. Without his knowledge or consent, other counsel procured the contract from the probate court, and offered it as an admission in writing by another signer that he was a stockholder in a certain corporation, and held the number of shares set opposite his signature. Decision might perhaps have been rested upon the ground that the client was protected from voluntary disclosures of the attorney. But, in reversing the ruling admitting the document in evidence, it is said that—

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"The admissibility of the communication, in our judgment, is not dependent upon the manner in which control thereof is obtained from the counsel, but upon the inherent character of the communication itself. If the admission or statement sought to be put in evidence was made by reason of the confidential relation existing between client and counsel, it becomes a privileged communication, and, as such, it is not competent evidence against the client. Its competency is not dependent upon the mere manner in which knowledge thereof may be obtained from counsel."

No authorities are referred to. See, also, *Lanctot* v. *State*, 98 Wis. 136 (73 N. W. 575, 67 Am. St. Rep. 800); *Ward* v. *State*, 70 Ark. 204 (66 S. W. 926). But the better rule, and the one most consonant with reason, is that the communications are not, because confidential in character, incompetent as evidence for or against the person making them. The applicable language of the statute —it is declaratory of the common law (*Hagerman* v. *Wigent*, 108 Mich. 192 [65 N. W. 756]) is:

"Nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage. * * *" 3 Comp. Laws, § 10213.

This has not been construed as applying to all communications made by one spouse to the other, but only to those which are confidential in their nature. *Ward* v. *Oliver*, 129 Mich. 300 (88 N. W. 631). The communication is privileged, but it is the privilege of the parties (*Maynard* v. *Vinton*, 59 Mich. 139, 152 [26 N. W. 401, 60 Am. Rep. 276]; *Derham* v. *Derham*, 125 Mich. 109, 112 [83 N. W. 1005]), and may be waived. It is not alone the confidential character of the communication, but it is that and also the relation of the parties which is the foundation of the privilege.

"The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation." 4 Wigmore on Evidence, § 2285.

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A communication made by a husband to his wife may be privileged. The same communication made by him to a daughter, or a son, or a sister, is not privileged, although precisely the same reasons in fact may exist for preserving the confidence inviolate. The privilege is in derogation of the general rule that all persons may be compelled to testify concerning facts inquired about in courts of justice. It should be made effective, but ought not to be extended by the courts to cases where there has been no injury to the relation of the parties by the betrayal of the confidence reposed. And so it has been held, and, we think, correctly, that where the communication, oral or written, has, without collusion or voluntary disclosure, escaped the custody and control of the parties communicating or the custody or control of their agents or representatives, it is not privileged. The communication being offered by some one other than the parties thereto, courts have in some instances refused to inquire as to the manner in which it was obtained. The cases are not numerous; the rulings are not harmonious. Some of them are collected in 23 Am. & Eng. Enc. Law (2d Ed.), p. 95 *et seq.* Precisely in point are *State* v. *Mathers*, 64 Vt. 101 (23 Atl. 590, 15 L. R. A. 268, 33 Am. St. Rep. 921); *State* v. *Hoyt*, 47 Conn. 518 (36 Am. Rep. 89); *Gannon* v. *People*, 127 Ill. 507 (21 N. E. 525, 11 Am. St. Rep. 147); *State* v. *Buffington*, 20 Kan. 599 (27 Am. Rep. 193); *Com.* v. *Griffin*, 110 Mass. 181; *Geiger* v. *State*, 6 Neb. 545. See, also, 1 Greenleaf on Evidence (15th Ed.), §§ 254, 254*a*, and notes, and note to *State* v. *Falsetta*, 10 Am. & Eng. Ann. Cas. 177, 179 (43 Wash. 159, 86 Pac. 168). See, generally, 4 Wigmore on Evidence, §§ 2332-2341. The precise question seems never to have been before presented in this court. In *People* v. *Durfee*, 62 Mich. 487 (29 N. W. 109), a deputy sheriff was allowed to testify to a conversation between attorney and client overheard by the witness. In *Cluett* v. *Rosenthal*, 100 Mich. 193 (58 N. W. 1009, 43 Am.

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St. Rep. 446), it was held that information obtained by a witness by means of a trespass or other tortious conduct may be received when offered by one not responsible for the tort. These decisions, as well as those which in holding that a privilege is involved refuse the rule that the evidence is under all circumstances incompetent, permit us to adopt and to apply what we have indicated as being in our opinion the correct rule. The letters should have been received in evidence.

4. The court was not in error in refusing to give defendant's first or third request to charge or in refusing to submit to the jury the question whether defendant had waived any of its defenses. The first request has relation to the alleged change of ownership, and has been considered in connection with the ruling refusing an amendment to the notice of special defenses. As to the other requests, we are referred to no authority to support the contention that the levying of a writ of attachment upon land, the buildings appurtenant being insured, there being no change of possession, is such a change in interest or title as avoids the policy of insurance. Ostrander on Fire Insurance (2d Ed.), p. 249. We are not informed by the record that plaintiff knew of the attachments.

The 17th assignment of error, which is that the court erred in failing to submit to the jury the question of whether the defendant had waived any of its defenses, and the 19th assignment, which is substantially the same, are too general. However, they are in effect mere repetitions of those already considered.

The court submitted to the jury one question of fact, which was: Did the fire occur by or through the intentional agency of the plaintiff? Upon the part of the appellee it is contended that because the policy of insurance was payable to the Lenawee County Savings Bank as its mortgage interest might appear, with the provision that as to this interest the insurance should not be invalidated by any act or neglect of the mortgagor or the owner of the property, because the bank after the fire assigned to plain-

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tiff and she in one count of her declaration declares as such assignee, therefore the judgment should be in any event affirmed. It appears that the mortgage liens of the said bank exceeded in amount the face of the policy of insurance. We think the question is not properly before us for decision. It did not appear to have been presented in the court below, and, in any event, it was not there determined. On the contrary, the case was determined upon an entirely different theory of plaintiff's right.

The judgment is reversed, and a new trial granted.

BLAIR, C. J., and MONTGOMERY, HOOKER, and BROOKE, JJ., concurred.

AMERICAN TELEPHONE & TELEGRAPH CO. v. SECRETARY OF STATE.

FOREIGN CORPORATIONS—TELEGRAPH AND TELEPHONE—AUTHORITY TO TRANSACT BUSINESS—MANDAMUS.

Under statutes of Michigan separating the functions of telegraph and telephone companies and restricting the right of one company to engage in the two kinds of business, mandamus will not issue in favor of a foreign corporation to compel the secretary of State to issue a certificate of authority to transact both kinds of business in Michigan, although the corporation is authorized so to do in the State where it is organized.

Mandamus by the American Telephone & Telegraph Company to compel Frederick C. Martindale, secretary of State, to issue a certificate of authority. Submitted November 18, 1909. (Calendar No. 23,663.) Writ denied December 10, 1909.

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Angell, Boynton, McMillan & Bodman, for relator.

John E. Bird, Attorney General (*Arthur P. Hicks*, of counsel), for respondent.

BROOKE, J. The relator is a corporation, organized in 1885, under an act of the legislature of the State of New York, entitled: "An act to provide for the incorporation and regulation of telegraph companies." By judicial construction of the courts of the State of New York, it has been determined that companies organized under this act, including relator, may lawfully conduct a telephone business as well as a telegraph business. *Hudson River Telephone Co.* v. *Railroad Co.*, 56 Hun, 67 (9 N. Y. Supp. 177); 61 Hun, 140 (15 N. Y. Supp. 752); 135 N. Y. 393 (32 N. E. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838); *Eels* v. *Telegraph Co.*, 143 N. Y. 133 (38 N. E. 202, 25 L. R. A. 640); *City of Rochester* v. *Telephone Co.*, 52 App. Div. (N. Y.) 6 (64 N. Y. Supp. 804); *Village of Carthage* v. *Telegraph Co.*, 185 N. Y. 448 (78 N. E. 165, 113 Am. St. Rep. 932). In October, 1908, relator applied to the secretary of State for a certificate of authority to do both a telephone and telegraph business in the State of Michigan. Respondent refused to issue the certificate, whereupon relator applied to this court for a writ of mandamus to compel its issuance.

The statute under which authority is granted foreign corporations to do business in Michigan is Act No. 310, Pub. Acts 1907. The proviso contained in section 4 thereof is as follows:

"*Provided*, That no such foreign corporation shall be permitted to transact business in this State, unless it be incorporated, in whole or in part, for the purpose or object for which a corporation may be formed under the laws of Michigan, and then only for such purpose or object. And the secretary of State shall, in the certificate which he issues, state under what act such corporation is to carry on business in this State, and such corporation shall have all the powers, rights, and privileges, and be subject to all the restrictions, requirements, and duties,

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granted to, or imposed upon, corporations organized under such act."

Sections 6667 to 6687, 2 Comp. Laws, provide for the incorporation and regulation of telegraph companies. The original act was passed by the legislature in 1847 (Act No. 4, Laws 1847). It was enlarged and re-enacted in 1851 (Act No. 59, Laws 1851), and various additions were made thereto down to the year 1873 (Act No. 14, Laws 1873). In the year 1883 the legislature passed an act authorizing the formation of telephone companies (Act No. 129, Pub. Acts 1883). For more than a quarter of a century the legislature has seen fit to keep separate these two lines of activity. This course has been followed, too, during a period in which the telephone business of the State has grown from an insignificant enterprise to one of great magnitude. At its inception messages could not readily be transmitted long distances, and many communities were without service. Today the telephone line extends to nearly every village in the State, and a very large and constantly increasing number of rural inhabitants enjoy its use. Wherever the telegraph line is, there, too, is the telephone. In the hands of independent agencies, it may well be that a healthy competition for the transmission of information by electricity will ensue. We are of opinion that the legislative enactments touching the question indicate a policy on the part of the State to afford its people a choice of two agencies of independent ownership. It is quite clear that, in the light of the separate enactments and the policy indicated thereby, we could not hold a domestic corporation capable of transacting both kinds of business. We think it logically follows that no foreign corporation should be given a privilege denied to those of our own creation, particularly when to do so would be subversive of the policy of the State.

It is urged by relator that the construction by the home State of corporate powers is binding everywhere, citing, among others, the case of *Thompson* v. *Waters*, 25 Mich. 214 (12 Am. Rep. 243). An examination of that case

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shows that, while the court did in fact hold a foreign corporation legally entitled to exercise in Michigan certain functions possessed by it under its home charter, that conclusion was reached only upon the ground that the legislature had never prohibited the exercise of such functions by a foreign corporation within the State. Indeed, legislation was found which seemed to the court to indicate an intent favorable to their exercise. In discussing the question of comity there involved, Chief Justice CHRISTIANCY said:

"The rule seems to be generally and well settled that the corporate existence, rights of making and enforcing contracts, of acquiring property, and of transacting business (not requiring the exercise of official corporate action or franchises within the State) of a corporation created by the laws of one State will be recognized and protected in another, subject only to the qualification that the enjoyment and exercise of such rights shall not be contrary to the laws or settled policy of the State in which they are sought to be enjoyed or exercised, or prejudicial to the interests of such State or its citizens. * * *

"A corporation, however, in any aspect in which it is here essential to consider it, is but an artificial person, whose strictly legal existence, by force of obligatory law, is confined to the State which has created it and endowed it with its powers, capacities, and rights, and it can only exercise those powers, capacities, and rights in another State by the permission, express or implied, of the sovereign or legislative power of the latter, which must be its own judge how far and upon what conditions it is consistent with its own domestic policy and the interests of its citizens to accord such recognition. * * *

"As it is not, then, the comity of the courts, but that of the State, and the question is upon the adoption, or qualified adoption, in this State of the laws, or rather certain incidents growing out of the laws, of Indiana, it follows that the power of determining the question whether, and how far, or with what modification, or upon what conditions, the laws of that State, or any rights dependent upon them, shall be recognized here, belongs to the legislative or lawmaking power of the State, and that the judiciary, whose province is only to declare and not to make the law, must be guided in their decision by the principle

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and policy adopted by the legislature of this State in reference to this question."

Applying the foregoing reasoning to the facts in the case at bar, we find there is no room for doubt as to the legislative intent or the policy of the State. For reasons good or bad, but satisfactory to itself, and presumably in the interests of its citizens, the State has chosen, with great deliberation and certainty, to maintain as separate and distinct agencies telephone and telegraph companies. To overturn this settled policy on the part of the State would, it seems to us, be as unwise as unwarranted.

Counsel for relator urge that, inasmuch as relator has power in New York to do two things, it at all events has the right to choose which of those two things it will do in Michigan; both being lawful. A sufficient answer to this proposition is that no such case is presented by the application. Relator applied for a certificate to do both, and seeks a mandamus to compel the issuance of such certificate.

The writ is denied.

BLAIR, C. J., and GRANT, MONTGOMERY, and OSTRANDER, JJ., concurred.

W. A. STURGEON & CO. v. BOARD OF ASSESSORS OF THE CITY OF DETROIT.

1. MANDAMUS—ADEQUATE REMEDY AT LAW—TAXATION OF PERSONAL PROPERTY—STATUTES.

Mandamus will not issue to compel the board of assessors to strike from the roll an assessment upon personal property erroneously determined to belong to relator, the remedy at law being adequate. 1 Comp. Laws, § 3876.

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2. SAME—TAXATION—PERSONAL PROPERTY.

It is a general rule that mandamus will not issue where it would be unavailing; and the rule is applicable where, in the usual course, a mandamus proceeding could not be determined before the assessment roll has left the hands of assessors to whom the writ should be directed.

3. SAME—REMEDIES—DEFENSES.

The prayer of a petition for mandamus cannot be granted where it asks that an assessment be struck from the rolls and shows that the relator is liable to assessment upon a portion of the valuation.

Certiorari to Wayne; Hosmer, J. Submitted November 17, 1909. (Calendar No. 23,467.) Decided December 10, 1909.

Mandamus by W. A. Sturgeon & Company to compel the board of assessors and the common council of the city of Detroit to strike an assessment from the tax rolls. An order denying the writ is reviewed by relator on writ of certiorari. Affirmed.

William Lucking, for relator.

Walter Barlow (*P. J. M. Hally*, of counsel), for respondents.

BROOKE, J. The complainant, a corporation, previously doing business in the city of Detroit, filed an application for mandamus in the circuit court, praying that the respondents be compelled to strike an assessment of $50,000 made against them from the assessment rolls for the current year. The writ was denied at circuit, and the case is here on certiorari.

The claim made is that previous to the 1st day of April the relator had parted with the title to a quantity of diamonds, which the respondents, with full knowledge of the facts, placed and retained upon said roll against the protest of relator. The assessment was for $50,000, and it is admitted that the diamonds are included within it at a valuation of $50,000. The answer alleges that these

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diamonds were in relator's possession on April 27th, and properly assessable to it, and that their value was $50,000, the amount of the personal assessment made. It should be remarked that the petition for mandamus shows that relator's whole assets since March 29th consisted of bills receivable approximating $46,000, and bills payable approximating $41,000. On the face of the petition, then, it appears that the relator should have been assessed upon at least $5,000.

We are of the opinion that the writ should be denied for three reasons:

(1) There is an adequate remedy at law, and mandamus is not the proper remedy.
(2) The roll is not now under the control of the respondents, and they cannot make the change.
(3) The court should not relieve relator from his entire personal tax, as he prays, in the face of his admission that he had $5,000, personal property, subject to taxation.

1. Adequate Legal Remedy. That one assessed a personal tax upon property owned by another may be relieved from the tax levied against him, is settled by the cases cited by counsel for relator. That he has another remedy than mandamus, is settled by the same cases. *City of Detroit* v. *Wayne Circuit Judge*, 127 Mich. 604 (86 N. W. 1032); *Woodmere Cemetery Ass'n* v. *Township of Springwells*, 130 Mich. 466 (90 N. W. 277); *Nester* v. *Township of Baraga*, 133 Mich. 640 (95 N. W. 722); *City of Detroit* v. *Transportation Co.*, 140 Mich. 174 (103 N. W. 557). In *City of Detroit* v. *Wayne Circuit Judge*, it was indicated that the collection of the assessment might be enjoined, and the validity of the assessment and tax inquired into. In *Woodmere Cemetery Ass'n* v. *Township of Springwells*, and *Nester* v. *Township of Baraga*, the action was assumpsit to recover taxes paid under protest. In *City of Detroit* v. *Transportation Co.*, the defense was made in an action brought to collect the taxes. This is a remedy provided by statute. See 1 Comp. Laws, § 3876. If there is any

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case holding that mandamus is a proper remedy in this class of cases, counsel have failed to cite it. There are many considerations of public policy which forbid such a remedy.

(1) It subjects the rolls to the unnecessary alterations.
(2) It prevents an orderly and seasonable completion of the rolls.
(3) It must often happen, as in this case, that, before a final decision can be made, the roll is out of the possession of the officer proceeded against, and the remedy sought cannot be enforced.

2. Possession of the Roll. It is a general rule that a mandamus will not issue where it will be unavailing. See Merrill on Mandamus, § 75, and cases cited. Presumably the roll is in the hands of the proper officer for collection. The charter provides that the assessors shall complete the roll before April 1st (Detroit Charter [1904], § 213), and shall return the roll to the common council on the third Tuesday of April (§ 217). Section 219 provides for review and appeal to common council and for confirmation by the council, after which the roll shall remain as the basis of all taxes, etc., and taxes shall become payable forthwith upon the receipt of the ward tax rolls by the receivers of taxes, which the law plainly implies shall be prior to the 1st day of August.

3. Striking out Entire Assessment. The bare statement of this ground heretofore made is all that need be said about it. Confessedly relator should pay on $5,000 of personal property. We are aware that the point upon which we dispose of this case was not raised by counsel. We cannot do them the injustice to believe it was overlooked. Apparently both sides are willing to have the matter finally disposed of here. To do this would be to make one more confusing precedent on the subject of mandamus. The case is one which should be settled in an action at law, where it can be judicially determined whether the relator did or did not own this property. It is apparent that assessors must often determine the owner-

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ship of property for the purpose of assessment, and questions of the correctness of their determinations must often arise. Their judgment should not be reviewed on mandamus, and the question may frequently be one upon which a jury should pass.

The order of the learned circuit judge is affirmed.

BLAIR, C. J., and MOORE, MCALVAY, and BROOKE, JJ., concurred.

KLATT v. WAYNE PROBATE JUDGE.

1. CONSTITUTIONAL LAW—STATUTES—PARTIAL INVALIDITY—PROBATE COURTS—EXECUTORS AND ADMINISTRATORS.

   An order of the probate court for the private sale of property by an administrator or executor may be made in accordance with the first three sections of Act No. 209, Pub. Acts 1909, which is not unconstitutional because the fourth section is invalid for failure of the title to embrace its object. Const. 1850, Art. iv, § 20.

2. SAME—STATUTORY CONSTRUCTION.

   An unconstitutional provision or section in a statute will not affect the other provisions of the law unless they are essentially and reasonably connected in substance.

3. ESTATES OF DECEDENTS—SALE OF REAL ESTATE—PROBATE COURTS—PRIVATE SALE.

   There being no limit to the value of real estate which could be sold at private sale, under Act No. 261, Pub. Acts 1905, amending chapters 243 and 244, 3 Comp. Laws, wherein a limitation of $500 was made; and a subsequent statute, Act No. 209, Pub. Acts 1909, being construed to refer to the statute as amended, it is proper to order a private sale by an administrator of real property worth more than $500.

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Certiorari to Wayne; Mandell, J. Submitted November 16, 1909. (Calendar No. 23,674.) Decided December 10, 1909.

Mandamus by Henry C. Klatt, administrator of the estate of Andrew Hollister, deceased, to compel Edgar O. Durfee, probate judge of Wayne county, to issue an order of sale. An order granting the writ is reviewed by respondent on writ of certiorari. Affirmed.

Russel, Campbell, Bulkley & Ledyard, for relator.

Angell, Boynton, McMillan & Bodman, for respondent.

The legislature, by Act No. 121, Pub. Acts 1897, enacted that:

"Whenever it shall be made to appear to the probate court that it is necessary for the preservation of the estate, or to prevent a sacrifice thereof, or for the best interest of all concerned therein, his executor or administrator may sell his real estate for that purpose upon obtaining a license therefor."

That act was held unconstitutional and void because in violation of section 20, article 4, of the Constitution, that "no law shall embrace more than one object which shall be expressed in its title." *Bresler* v. *Investment Ass'n*, 156 Mich. 3 (120 N. W. 21). In 1909 the legislature passed Act No. 209, entitled:

"An act to provide for the sale of real estate or any interest therein, under license of the probate court, by executors, administrators and guardians."

That act authorizes the sale of real estate "when it shall appear to the court that a sale of such real estate is necessary to preserve the estate or to prevent a sacrifice thereof, or to carry out the provisions of the will." Section 3 reads:

"Proceedings for obtaining a license for the sale of real estate and the sale thereof by executors, administrators

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and guardians shall be in accordance with the provisions of chapters two hundred forty-three and two hundred forty-four of the compiled laws of eighteen hundred ninety-seven, when not inconsistent herewith."

Section 4 reads:

"All sales of real estate made by executors, administrators or guardians under license of the probate court, pursuant to the provisions of chapter two hundred forty-three of the compiled laws of eighteen hundred ninety-seven are hereby declared to be valid."

The relator filed a petition in the probate court of Wayne county setting forth that it was necessary for the preservation of the estate to sell certain real estate described in the petition, and praying for an order of sale. The respondent refused the order for two reasons:

(1) The act was unconstitutional, in that it contained two objects, only one of which was expressed in the title.
(2) That the act, if valid, authorized proceedings to sell property at private sale only when the value was $500 or under.

The administrator applied to the circuit court for a writ of mandamus to review the order of the probate court. The circuit court reversed the decision of the probate court, and held the act to be constitutional, and that it authorized the sale in excess of the value of $500. The case is now before us for review on certiorari.

GRANT, J. (*after stating the facts*). The learned counsel for both parties concede that the enabling section 4 of the act is void. There is nothing in the title to the act to indicate any purpose on the part of the legislature to pass an enabling act to validate void sales made under an unconstitutional act. The provisions of section 4 are entirely foreign to the purpose mentioned in the title. We therefore concur in the conclusion reached by counsel that section 4 is void under the constitutional provision

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above cited. The case therefore presents two questions:

1. Can the act be sustained as a valid, complete act with section 4 eliminated? Under the rule approved by this court in *Robison* v. *Miner*, 68 Mich. 549 (37 N. W. 21), and *Mathias* v. *Cramer*, 73 Mich. 5 (40 N. W. 926), the question must be answered in the affirmative. Without section 4 the act is complete. There is no necessary connection between that section and the other provisions of the act. The case clearly falls within the rule stated by Mr. Justice LONG:

"An unconstitutional provision or section in a statute will not affect the other provisions of the law unless they are essentially and inseparably connected in substance." *Mathias* v. *Cramer*, *supra*.

See, also, Cooley on Constitutional Limitations (7th Ed.), p. 246.

2. Does the act limit the authority of the probate court to private sales where the value of the real estate exceeds $500? But for Act No. 261, Pub. Acts 1905, the respondent's contention should undoubtedly be sustained. Act No. 209, Pub. Acts 1909, requires the proceedings under it to be in accordance with the provisions of chapters 243 and 244 of the Compiled Laws of 1897, when not inconsistent therewith. By section 9166, chap. 244, the probate judge was authorized to license private sales where the value of the real estate did not exceed $500. Act No. 261, Pub. Acts 1905, amended this section and eliminated this limitation, and authorized private sales of real estate regardless of their value. When, therefore, the act of 1909 was passed there was no limitation of value as a condition to private sales. The amendment became a part of the original act, and subsequent acts will be construed as having reference to the act as amended, although the statute does not in express terms include amendatory acts. *Hatch* v. *Calhoun Circuit Judge*, 127 Mich. 174 (86 N. W. 518); *People* v. *Railroad Co.*, 145 Mich. 140 (108 N. W. 772).

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It follows that the probate court had authority to authorize this sale, and the judgment is affirmed. No costs will be allowed.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

BAUMGARTH v. FIREMEN'S FUND INSURANCE CO.

1. COSTS—ASSIGNMENTS—LIABILITY OF ASSIGNEE.
   Costs are taxable in the Supreme Court against the persons beneficially interested as assignees of a cause of action by virtue of an assignment made prior to the commencement of the action, within the terms of 3 Comp. Laws, § 11281.

2. APPEAL AND ERROR—NATURE OF WRIT—CONTINUATION OF THE ACTION.
   The issuance of a writ of error from the Supreme Court is a continuation of the original cause, not a new proceeding.

Assumpsit by Morris C. Baumgarth and Rudolph Baumgarth, copartners as Baumgarth Bros., against the Firemen's Fund Insurance Company on a policy of insurance: On motion of defendant for the taxation of costs against plaintiff's assignees. Submitted November 16, 1909. (Calendar No. 22,573.) Motion granted December 10, 1909.

Haug & Yerkes (*Lucking, Emmons & Helfman*, of counsel), for the motion.

Bernard B. Selling and *Butzel & Butzel, contra.*

MONTGOMERY, J. Plaintiffs having recovered judg-

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ment in the circuit court against the defendant, the defendant upon writ of error procured a reversal of that judgment. (152 Mich. 479 [116 N. W. 449].) A motion is now made by the defendant to have the costs taxed against Adolphus Fixel, A. Krolik & Co., and Imerman Bros., in whose interest an assignment of the claim of plaintiffs against the defendant was made, and in whose interest the suit was prosecuted; it appearing from affidavits on file that these parties contributed to the expense of the prosecution of the case.

The statute relied upon is section 11281, 3 Comp. Laws, which reads:

"When any action shall be brought in the name of another, by an assignee of any right of action, or by any person beneficially interested in the recovery in such action, such assignee or person shall be liable for costs in the same cases, and to the same extent, in which a plaintiff would be liable, and the payment of such costs may be enforced by attachment in all cases where judgment is not by law required to be rendered therefor against such assignee or person interested."

This section appears to have been taken from the Revised Statutes of New York. Under that statute, the courts of New York have held in *Whitney* v. *Cooper*, 1 Hill (N. Y.), 629, that an assignee of a claim in suit, although the assignment simply gave him a lien upon the recovery, was liable under this statute to respond for costs. This was reaffirmed in *Carnahan* v. *Pond*, 15 Abb. Prac. (N. Y.), 194. See, also *McHench* v. *McHench*, 7 Hill (N. Y.), 204. Both parties in the present case rely upon the rule of construction that, in the adoption of a statute of a sister State, it is to be presumed that the statute was adopted with reference to the judicial construction given to such statute in the sister State. The cases above cited would seem to make it clear that, had the defendant recovered in the circuit court, he would have been entitled to tax the costs against the parties beneficially interested.

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But it is contended upon the authority of *Bendernagle* v. *Cocks*, 19 Wend. (N. Y.) 151, that the party beneficially interested is not liable for costs incurred where the nominal party prevails in the court below and the case is brought to this court by writ of error. It was held in that case that a writ of error is to be treated as a new suit, and not a continuation of a suit below, and that, therefore, the party in interest was merely defending in the court of appeals and was not a volunteer, and therefore was not liable for the costs under this statute. This case in no way negatives the right to recover against the parties beneficially interested, if they, in fact, are to be treated as the moving parties in the case. But there is authority for the view that in New York the writ of error is regarded as a new suit. But such is not our understanding of the effect of a writ of error in Michigan. In Michigan, the writ of error should be considered as a continuation of the original suit. This is the rule in other States. See *Hart* v. *Mills*, 38 Tex. 513; *Hinchman* v. *Rutan*, 31 N. J. Law, 499. An analogous question arose in this State in *McLean* v. *Isbell*, 44 Mich. 129 (6 N. W. 210), in which case it was contended that the removal of a case from justice's court to the circuit by certiorari was analogous to a writ of error, and that the suing out of a writ of error was the institution of a new action and not the same as commenced in justice's court, and therefore that security for costs in such action (instituted in justice's court) was not liable for the costs on certiorari. The court, however, held against this contention. After citing the Federal cases on the subject, the court said:

"In considering the point now in question, this explanation of the theory of a writ of error is an important factor, and it follows from it that, in case the analogy ascribed to the certiorari is true, the latter was not only not a separate suit, but was, in fact, a *proceeding in the nature of an appeal.* Its purpose was 'entirely defensive.' Hence the ground of reasoning relied on to maintain the objection decisively overrules it. The doctrine

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quoted to prove that the statute did not warrant the entry of judgment against the surety turns out to be authority for the view of the court below that it did warrant it."

We think the motion should prevail.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

GRAND RAPIDS & INDIANA RAILROAD CO. *v.* CHEBOYGAN CIRCUIT JUDGE.

1. MANDAMUS—CHANGE OF VENUE—MOTIONS.
   On a motion for a change of venue alleging local prejudice, which was denied by the finding and return of the circuit judge, the framing of an issue of fact will not be compelled by writ of mandamus, and the trial delayed until its determination.

2. SAME—VENUE—WAIVER OF RIGHT TO CHANGE.
   Setting a cause for trial on a day certain at the relator's request operates as a waiver of the right to review a previous refusal to grant a change of venue.

3. SAME—DISCRETION TO DENY CHANGE OF VENUE—STATUTES.
   The statutes authorizing a change of venue on motion do not require the granting of the motion as an imperative right. Act No. 67, Pub. Acts 1909.

4. CONSTITUTIONAL LAW—AMENDMENT OF STATUTES.
   Act No. 67, Pub. Acts 1909, which contains a proviso that a change of venue may be procured on motion in causes pending in the manner provided by 1 Comp. Laws. § 309, as amended by Act No. 309, Pub. Acts 1905, does not re-enact the repealed provisions of such Act No. 309, in view of the constitutional prohibition against a revision or amendment by mere reference to an act.

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Mandamus by the Grand Rapids & Indiana Railroad Company to compel Frank Shepherd, circuit judge of Cheboygan county, to vacate an order denying a change of venue. Submitted November 16, 1909. (Calendar No. 23,638½.) Writ denied December 10, 1909.

James H. Campbell, for relator.

Benjamin & Quay (*De Vere Hall*, of counsel), for respondent.

MONTGOMERY, J. This is an application for a mandamus to compel the respondent to enter an order removing the case of James Foley against the relator from Cheboygan county to Emmet county for trial. It is claimed, *first*, that upon the affidavit being filed, showing that the plaintiff in such action has an undue influence on the citizens of Cheboygan county, it became the imperative duty of the court, as a matter of law, to grant the motion for change of venue, on the authority of *Preston Nat. Bank* v. *Wayne Circuit Judge*, 142 Mich. 272 (105 N. W. 757); and, *second*, that the circuit judge was guilty of an abuse of discretion in failing to grant the motion.

The return of the circuit judge shows that he was not convinced that there was any prejudice against the defendant in Cheboygan county, or that it could not have a fair trial, and went further and stated that, while a trial at the Emmet circuit would be more convenient for the witnesses, there was more likely to be prejudice there against the plaintiff than there was to be prejudice against the defendant in Cheboygan. Upon this return the petitioner has asked that an issue be framed. We think upon this question the case of *Lyle* v. *Cass Circuit Judge*, 157 Mich. 33 (121 N. W. 306), should be held controlling. It would be unseemly that an issue of fact should be raised upon the return of the circuit judge, and this case delayed in the circuit until that question should be tried. If any right exists to review such an order by writ of mandamus, the return of the circuit judge, showing, as it does, that

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counsel for defendant procured the case to be set down for a day certain for trial, would be sufficient to waive that right.

But it is contended that, as a matter of law, the circuit judge erred in refusing to grant this motion; in other words, that upon the filing of the affidavit in support of the motion it became his imperative duty to grant the motion, and that the facts stated in the affidavit could not be controverted. Such we held was the effect of section 10, Act No. 309, of the Public Acts of 1905, an act which the legislature very wisely amended at the next session of the legislature, by Act No. 161, Pub. Acts 1907. It is claimed, however, that by Act No. 67, Pub. Acts 1909, the legislature by a proviso has re-enacted the provisions of the act of 1905. This proviso reads as follows:

"In any and all suits, proceedings, causes or actions now pending in any of the circuit courts of this State, whether the court has general or special jurisdiction, a change of venue may be had in the manner provided and in accordance with said section ten of act number one hundred fifty-seven of the public acts of eighteen hundred fifty-one, as amended by said act number three hundred nine of the public acts of nineteen hundred five, and the provisions of said act shall be continued in full force and effect for such purpose."

Whether the reference to the amendment of 1907 was left out of this proviso by inadvertence, it is impossible to say. Certainly, if the effort was by this proviso to repeal the provisions of the act of 1907, which materially modified the act of 1905, it is in direct conflict with the provisions of section 21 of article 5 of the Constitution, which provides that no law shall be revised, altered, or amended by reference to the title amended, but the act revised and the section or sections of the act altered or amended shall be re-enacted and published at length. This clearly was not done. The act as it stood after the amendment of 1907 was, under the relator's contention, repealed without any attempt to re-enact or publish the original act of 1905

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at length. The legislature has not accomplished the result of re-enacting the law of 1905. We doubt very much whether such was the legislative intent.

The writ of mandamus will be denied.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

ZIMMER *v.* BOARD OF SUPERVISORS OF BAY COUNTY.

1. CONSTITUTIONAL LAW—JUDICIAL POWER—COURTS.
   A statute by which a committee on appeal is appointed by members of the board of supervisors who consider themselves aggrieved by an apportionment of taxes between townships and cities, giving the committee power to summon witnesses, consider evidence and determine whether the equalization is just, confers *quasi* judicial powers. Act No. 292, Pub. Acts 1909.

2. SAME—COURTS—WORDS AND PHRASES.
   Such committee is not a court within the meaning of Constitution, Art. 7, § 1, requiring a two-thirds vote of the legislature to establish additional courts.

3. SAME—LOCAL SELF-GOVERNMENT—COUNTIES—TAXATION.
   It is in violation of the constitutional principle of local self-government for the legislature to enact a statute which authorizes a dissatisfied member of the board of supervisors to create a committee of three consisting of nonresidents of the county, of whom the dissenting member is authorized to name one, and who are required by the act to determine whether or not the apportionment among townships and cities is just.

4. SAME—LEGISLATIVE AUTHORITY—TAXATION.
   The legislature has no power under the Constitution to clothe one or two supervisors of a county with authority to name a tribunal which shall have the right to assume and perform the duties devolving upon the board itself under the law.

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5. COURTS—DISQUALIFICATION OF JUDGES—STATUTES—CONSTITUTIONAL LAW.

A statute which permits a supervisor, aggrieved by the apportionment of a tax, to name one of the members of a board or committee to act as an appeal tribunal, violates the rule that no man may be a judge or select the judge of a case in which he has an interest.

Certiorari to Bay; Collins, J. Submitted November 29, 1909. (Calendar No. 23,746.) Decided December 21, 1909.

Mandamus by Nicholas D. Zimmer to compel the board of supervisors of Bay county to convene and apportion the State and county taxes in accordance with the report of a committee on appeals acting under the provisions of Act No. 292, Pub. Acts 1909. An order denying the writ is reviewed by relator on writ of certiorari. Affirmed.

Pierce & Kinnane, for relator.

Gillett & Clark, for respondent.

BROOKE, J. Relator is a duly qualified supervisor of Bangor township, one of the political divisions of Bay county. The board of supervisors of said county consists of 39 members, 23 of whom were elected from the city of Bay City, and 16 from the townships. At the annual meeting, held in October, 1909, the board made and adopted an equalization of the valuations of the several townships of said Bay county, and of the city of Bay City. Whereupon relator, considering his township (Bangor) aggrieved by the action of the board in said equalization, filed a petition for the purpose of appealing therefrom to the committee on appeal, in accordance with the provisions of Act No. 292, Public Acts 1909, and named an ex-supervisor of an adjoining (Saginaw) county, one Cameron C. Speer, as the first member of said committee on appeal. Notice of said appeal having been duly served upon the chairman of the board, he, the chairman (George Hartingh,

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supervisor of Pinconning township), proceeded in accordance with the provisions of the statute to name the second member of said committee on appeal, in the person of one George W. Kenney, an ex-supervisor of Arenac county. Speer and Kenney then met, and named one James Spiker, an ex-supervisor of Midland county, as the third member of said committee.

The committee organized by electing a chairman and clerk, and held sessions from November 8th to 13th, inclusive, hearing the testimony of all persons who appeared before it, examined the assessment rolls, and inspected, to some extent, the real estate in the city of Bay City and the adjoining townships, and on November 13th filed its "decision and determination," which is, in part, as follows:

"Said committee on appeal, after due consideration of all matters relating to the equalization of the valuations of the several townships of Bay county, and the city of Bay City, made by the board of supervisors of said county at the October, 1909, session of said board, being the equalization appealed from in this proceeding, do hereby find, decide, determine, and decree as follows: (*a*) That the equalization made by the board of supervisors of said county, at its October, 1909, session, is unfair, unjust, and discriminatory, and that the valuations of said county have been improperly equalized by said equalization, made by said board as aforesaid. (*b*) That said equalization, made by the board of supervisors of said county at its October, 1909, session, as aforesaid, be, and the same is hereby, revised, altered, and amended by adding to the valuations of the real estate of the city of Bay City, as equalized at the said October session of said board of supervisors, as aforesaid, the sum of $1,474,036, and deducting from the valuations of the real estate of the townships of said county, severally, as equalized at the said October session of said board, the sums respectively set opposite the name of each township, viz." (amounting in the aggregate to $1,474,036).

The clerk of said board, acting under the provisions of said act, proceeded to call a meeting of the board to be held on November 18, 1909, for the purpose of apportion-

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ing the State and county taxes, to be raised by said county for 1909, in accordance with the equalization made by said committee on appeal. On the day appointed for said meeting the 16 supervisors from the townships were present, but the 23 from the city, apparently by concert of action, absented themselves, thereby preventing the assembly of a quorum, and the transaction of any business. Relator thereupon filed his petition in the circuit court, praying for mandamus to compel the city members of the board to attend and proceed to apportion the State and county taxes for the year 1909, in accordance with the report of the committee on appeal. The circuit court denied the writ, and relator has brought the case here by writ of certiorari.

It is urged by the respondent: *First*, that said act is unconstitutional and void, because it attempts to confer upon the "committee on appeal" judicial powers; and, *second*, because it deprives counties of the inherent right of local self-government.

Does the act confer judicial powers upon the committee? The act provides:

"The said committee on appeal shall, at the time herein provided for, forthwith examine the appellant's petition, and if in the judgment of said committee, there be a showing to the effect that the equalization complained of is unfair, unjust, inequitable, or discriminatory, it shall proceed at once to investigate and pass upon complaints, relative to the assessment and taxation of property, and the action of the said board of supervisors, in connection with the equalization and valuation of said county. The said committee on appeal shall have the authority to consider and pass upon the action and determination of the said board of supervisors, in equalizing said valuations, and may consider complaints relative to the assessment and taxation of property. The said committee on appeal shall have the right to order the said board of supervisors to reconvene and to cause the assessment rolls of said county to be brought before it, and it may summon the several supervisors of said county before it, to give evidence in relation to said equalization, and may take such further action and may make such further investigation in the

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premises, as it may deem necessary. * * * If the said committee on appeal, after due consideration, decide that the valuations of said county have been improperly equalized, it shall proceed to make such deductions from, or additions to, the valuations of the respective townships, wards, or cities, as may be deemed proper. * * * As soon as said board of supervisors has reconvened, it shall immediately proceed to apportion the State and county taxes, to the several assessing districts, in accordance with the equalization so made."

We think it is apparent from the above quotation that the legislature did confer *quasi* judicial powers upon the committee. It has power to summon witnesses, to hear evidence, and to *determine* whether or not the equalization made by the board of supervisors is just.

In the case of *State, ex rel. Ellis*, v. *Thorne*, 112 Wis. 81 (87 N. W. 797, 55 L. R. A. 956), where a somewhat similar act was under consideration, it was held that the act conferred judicial powers, but that it was not in conflict with the Constitution of that State. Our Constitution (article 7, § 1) provides:

"The judicial power shall be vested in one Supreme Court, circuit courts, probate courts, justices of the peace, and such other courts of civil and criminal jurisdiction, inferior to the Supreme Court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house."

An examination of Senate Journal (volume 2, p. 1288) shows that the act in question did not receive a two-thirds vote of the members of the Senate. This act, therefore, if the committee on appeal is to be considered a "court of civil and criminal jurisdiction" within the meaning of the constitutional provision *supra*, must fail, for the reason that it did not receive the requisite number of votes. We are, however, of the opinion that the committee on appeal should not be considered a "court" within the meaning of the Constitution. It is quite clear that it is both necessary and expedient for the legislature to confer judicial or *quasi* judicial functions upon executive or administrative

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officers, the exercise of which is merely occasional or incidental. To call every such officer a judge, and his office a court, would, we think, be entirely unwarranted. See *Attorney General* v. *Jochim*, 99 Mich. 358 (58 N. W. 611, 23 L. R. A. 699, 41 Am. St. Rep. 606), where it is held that the exercise of judicial or *quasi* judicial power by the governor of the State was not unconstitutional.

Does the act deprive counties of their inherent right of local self-government? It is relator's claim that upon this point the case at bar is ruled by *Board of State Tax Commissioners* v. *Board of Assessors*, 124 Mich. 491 (83 N. W. 209); *Board of State Tax Commissioners* v. *Quinn*, 125 Mich. 128 (84 N. W. 1). An examination of the first of these two cases, which upon the point under consideration rules the second, will clearly demonstrate the ground upon which the decision went. At page 496 Chief Justice MONTGOMERY, speaking for the court, says:

"It was not distinctively a matter of local concern. The State is concerned in the proper assessment of property, not only as to its own interests, as they are affected by the collection or failure to collect the funds necessary to carry on government, but, as the supreme authority in the State, the legislature is required, by section 12, Art. 14, of the Constitution, to see to it that assessments be made upon property at its real value."

Can it be said of the act under consideration that the State has an interest in the activities of the committee on appeal, or that they are not "distinctively a matter of local concern?" We think not. The concluding sentence of section 34 of the act is as follows:

"*Provided further*, That the said committee on appeal, shall not increase the aggregate valuation of said county."

It is manifest that the State has no interest in the matter. The county as a whole pays the same tax to the State, whether it pays according to one equalization or the other. The burden is simply, in part, lifted from one

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township or ward, and imposed upon another township or ward. The action of the committee produces a purely local result. Its action, however, relieves one portion of the local community from taxation in a measure, and imposes upon another an additional burden. This result is reached through the intervention of a nonresident body of men not representatives of the people of the county in which they act, and is repugnant to the well-settled principles of local self-government, so frequently asserted and upheld by an unbroken line of decisions of this court. *People* v. *Hurlbut*, 24 Mich. 44 (9 Am. Rep. 103); *People* v. *Murray*, 89 Mich. 276 (50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294); *Township of Ada* v. *Kent Circuit Judge*, 114 Mich. 77 (72 N. W. 35); *Moreland* v. *Millen*, 126 Mich. 381 (85 N. W. 882); *Board of Road Com'rs of Wayne County* v. *Board of Auditors*, 148 Mich. 255 (111 N. W. 901); *Davidson* v. *Hine*, 151 Mich. 294 (115 N. W. 246, 15 L. R. A. [N. S.] 575, 123 Am. St. Rep. 267).

We have said the committee on appeal is not representative of the people of Bay county. The method of its appointment provided by the act clearly shows that it was the intention of the legislature to provide for its creation from nonresident elements, without appeal to the citizens of the county in which it is to act.

The legislature has no power, under the Constitution, to clothe one or two supervisors of a county with authority to name a tribunal which shall have the right to assume and perform the duties devolving upon the board itself, under the law. The board of supervisors is elected by the people of the county, and represents the people of the county. The committee on appeal, appointed in the manner set out in the act, represents nobody, unless it can be said to represent the supervisor who called it into being, by filing his claim of appeal and naming one of its three members.

A familiar rule of law is that no man may be a judge in his own case. It is equally true that no man may appoint a tribunal (or any constituent part thereof) to de-

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termine a case in which he is interested. In conferring the power of appointment upon a supervisor the legislature does not appeal to his discretion. Indeed the power is only to be exercised when "he considers his township or city aggrieved." In other words, when, as a representative of his township, he has become a partisan with a grievance, he may name one of three of a tribunal to pass upon and adjudicate that grievance. The legitimate result of such a course is a tribunal unfair and partisan in character. No law permitting such consequences can be sustained. *Atchison, etc., R. Co.* v. *Clark*, 60 Kan. 826 (58 Pac. 477, 47 L. R. A. 77); *Meyers* v. *Shields*, 61 Fed. 713; *Brinkerhoff* v. *Brumfield*, 94 Fed. 422.

No better illustration of the vice of such legislation could be afforded than the case at bar. Relator and the chairman of the board, both being supervisors of townships, and being of the so-called minority, upon said board, name two members of the committee. To say that, in the exercise of this power of appointment, it is to be presumed that the supervisors will select impartial and unprejudiced men is idle. It entirely ignores one of the commonest of human attributes, selfishness. In fact the act seems to contemplate that the dissatisfied supervisor shall name a partisan; at any rate, he is not enjoined, either in terms or by implication, to select a man of fairness and impartiality. The two, thus selected, agree on a third. As the committee in the case at bar is constituted, it is quite immaterial whether he be a fair man or otherwise, as the two already selected constitute a majority of the committee and control his action. What this committee did in the premises has been outlined *supra*. Whether its action evidences unfairness and discrimination or not is a matter of no consequence. If what it *did* do is legal, then what it *could* do in a like case would be proper, and we would doubtless see discrimination, not only of the townships against the city, or the city against the townships, but discrimination of one or two townships against all the rest, or of one or two wards against all the rest, and this, too, resulting

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from the acts of men not resident in the county, not elected by its citizens, and not responsible to any one for the proper, fair, and impartial performance of their duties.

The action of the learned circuit judge in denying the writ, upon the ground that the act is unconstitutional, is affirmed.

GRANT, MONTGOMERY, HOOKER, and MCALVAY, JJ., concurred with BROOKE, J.

OSTRANDER, J. The proceeding in which boards of supervisors of counties examine the assessment rolls of the townships and wards to ascertain whether the values of real estate have been uniformly estimated, and, if it determines that such values as they appear upon the rolls are relatively unequal, add to or deduct from the total assessed valuation of such townships and wards, or some of them, an amount which will, in the judgment of the board, produce an equal and uniform valuation of real estate, is a familiar proceeding, a step in the system established for the collection of public revenues. It is upon the footing established in this proceeding that the levy apportioned by the State to the county is again apportioned to the taxing districts within the county. By Act No. 292, Pub. Acts 1909, the tax law was amended so as to provide for a review of the action of boards of supervisors in this behalf, and it is this provision for a review and for an equalization of rolls by a committee on appeal which is, in this proceeding, attacked. The grounds upon which the constitutionality of the provision is assailed are (1) that judicial power is conferred upon the committee on appeal; (2) that it deprives counties of the inherent right of local self-government; (3) the tribunal or agency which is created is not an impartial one; (4) the subject-matter of the amendment is not germane to the subject-matter of the original act, and not within the title thereof; (5) the act as amended is incomplete and defective—not a workable law. The circuit court for Bay county was asked to compel such action of the board

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of supervisors as would permit the law to be carried into effect. This the court declined to do, having reached the conclusion that the legislature had no power to provide for a review of the equalization made by the board of supervisors except by a board of State officers of higher authority and more extensive powers than those possessed by the board of supervisors, and that the law does not provide for an impartial tribunal. There is therefore involved here the always grave responsibility of considering whether an act of the legislature should be declared to be invalid. The contentions presented, excepting, perhaps, the one last stated, may be considered together.

It is clear that the power of the legislature extends so far as to provide for a system for the levying and collecting of taxes, including the designation of the agencies to be employed. *Board of State Tax Com'rs* v. *Board of Assessors*, 124 Mich. 491 (83 N. W. 209). See, also, *State, ex rel. County of Brown*, v. *Myers*, 52 Wis. 628 (9 N. W. 777); 1 Cooley on Taxation (3d Ed.), p. 43. We are familiar with legislation which provides for appeals from the determination of certain officers to certain other officers or boards, and this in matters purely local in character. Examples will be found in 2 Comp. Laws, §§ 4042, 4043, 4707; Act No. 272, Pub. Acts 1899, in which, in chapter 5, the probate court is authorized to appoint, in appeals from the assessment of drain taxes, a board of review of disinterested and competent freeholders "not residents of the township or townships affected by said drain." It is as well within the legislative power to provide the agency which shall finally determine when a proper equalization has been made, as it is to provide the agency which shall determine when taxable property has been properly listed and valued upon assessment rolls. The legislative provision is no more an invasion of the right of local self-government in one case than it is in the other. And an amendment to a general tax law, which does no more than to provide for a review of the equalization and supply an agency for such review, is an amendment

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within the title of the original act. If it had been included in the original act, there could be no question that the provision was within the title. If the legislation in question does no more than this, and is otherwise capable of enforcement, it cannot be said to be an unconstitutional exercise of legislative power, or to be invalid, because a new agency or tribunal, which does no more—has no greater powers in the premises—than the board of supervisors has always exercised, ought not to be held to be a court or a body exercising judicial powers, within the meaning of the Constitution. The controlling question, therefore, is whether the law merely provides for a new or additional proceeding in the general system, and for a new agency, or whether it does more or less than this.

Having admitted that within certain constitutional restrictions, not applicable here, the power of the legislature in matters concerning the levying and collecting of taxes is plenary, a successful attack upon the law in question must proceed upon the theory of a failure, in the particular instance, to accomplish what the legislature had power to accomplish. The powers given by the act to the committee on appeal are no other or greater than those exercised, time out of mind, by boards of supervisors, and the act is not open to the criticism that excessive powers are granted, or powers too limited to accomplish the evident purpose of the legislature. Invalidity of the legislation, if it is invalid, must arise out of the manner provided for constituting the committee on appeal. It is well to notice the provision with some care. The committee must be selected from ex-supervisors of adjoining counties. An ex-supervisor, when chosen, must act under penalty of fine or imprisonment, or both. Therefore one conscious of a lack of ability, or knowing himself to be not indifferent, must nevertheless serve. No oath is required, no right to object to the committee is secured. The selection of the committee is not made by the legislature, or by any responsible officer of the State, nor is the indifference of the members of the committee a condition which is even

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referred to. A member of the committee, though a nonresident of the county, may be owner of property in the county. The committee is selected—the tribunal is created—by interested parties. It is a maxim of the law, older than our Constitutions, that no man may be constituted a judge in his own cause. It is applicable to every case where an aggrieved party is permitted to select the judge. Private rights may, by agreement of parties, so be submitted to arbitration that courts may enforce the awards. 3 Comp. Laws, chap. 302. But in the matter before us, public as well as private interests are involved, and may be determined by an agency selected by representatives of the parties aggrieved. In the somewhat similar Wisconsin statute, to which attention has been directed, the circuit judge is required to appoint the commissioners; who may not be owners of real estate in the county; must be appointed upon notice to the board of supervisors; be sworn to faithfully and impartially discharge the duties imposed. *State, ex rel. County of Brown*, v. *Myers, supra; State, ex rel. Ellis*, v. *Thorne*, 112 Wis. 81 (87 N. W. 797, 55 L. R. A. 956). We are constrained to say that the legislature in the act in question has constituted neither a State nor a local agency of taxation, but has, inadvertently no doubt, delegated to aggrieved parties the selection of a committee empowered to undo what the regularly elected officers of the townships and wards of the county have done officially. A privately constituted and officially irresponsible committee is empowered to review and perform the duties of responsible officials.

We are required to, and do, affirm the order of the circuit court for Bay county. No costs are awarded.

BLAIR, C. J., and MOORE, J., concurred with OSTRANDER, J.

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ROBINSON v. WESTOVER.

CONSTITUTIONAL LAW — LOCAL SELF-GOVERNMENT — TAXATION.

The facts in this case involve the construction of Act No. 292, Pub. Acts 1909, and it is ruled by the preceding case of *Zimmer* v. *Board of Sup'rs of Bay Co.*, *ante*, 213.

Certiorari to Muskegon; Sessions, J. Submitted November 12, 1909. (Calendar No. 23,709.) Decided December 21, 1909.

Mandamus by Edwin C. Robinson, assessor of the city of Muskegon, to compel John G. Westover, chairman of the board of supervisors of Muskegon county, to designate a member of a committee on appeals under the provisions of Act No. 292, Pub. Acts 1909. An order granting the writ is reviewed by respondent on writ of certiorari. Reversed.

J. A. McLaughlin (*William Carpenter* and *J. E. Turner*, of counsel), for relator.

Alex. Sutherland and *Wallace Foote* (*James E. Sullivan*, of counsel), for respondent.

MOORE, J. The following statement of facts is taken from the brief for relator:

"The relator filed his petition in the circuit court for the county of Muskegon, asking for a writ of mandamus to compel the respondent to name a second member of the committee on appeal, in accordance with the provisions of Act No. 292, Pub. Acts 1909. On the hearing before the court a peremptory writ of mandamus was granted in accordance with the prayer in the petition. The respondent has brought the case to this court by certiorari.

"The relator is the assessor of the city of Muskegon, and as such is entitled to a seat in the board of supervisors,

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and to all the privileges and powers of supervisors of townships, in the matter of the assessment and levying of taxes, and likewise all the duties incident to taxation incumbent upon the supervisors of townships are imposed upon him. When the matter of equalization of the assessment rolls of the several townships and cities in the county of Muskegon was before the board of supervisors of that county, the members of all the townships voted in favor of the equalization that was adopted, by which $1,224,948 was added to the assessment roll of the city of Muskegon, and $153,503 to the assessment roll of the city of Muskegon Heights, and $970,371 was deducted from the assessment rolls of the several townships in the county, ranging in amount from $6,030 to $136,415. All the representatives of the cities of Muskegon and Muskegon Heights objected to and voted against the equalization. Within the time prescribed by Act No. 292, Pub. Acts 1909, and in compliance with all the provisions of that act, the relator, who is the assessor of the city of Muskegon, appealed from the determination of the board to the committee on appeal provided for in that act, and named a member of that committee. Subsequently four other supervisors of certain townships in the county, who had voted in favor of the equalization, also filed petitions for appeal, and named different persons as members of the committee on appeal. The relator's appeal was properly taken, but the respondent, who is the chairman of the board of supervisors, declined to name a second member of the committee, alleging as his reasons therefor:

"*First.* That the relator is not a supervisor within the meaning of Act No. 292, Pub. Acts 1909, and therefore is not entitled to appeal.

"*Second.* That other supervisors had also filed petitions for appeal, and that Act No. 292 cannot be carried into effect where different supervisors of a county appeal from the equalization of the board of supervisors, and different ex-supervisors of adjoining counties have been named, or are named by such appealing supervisors, as members of the committee on appeal.

"*Third.* That Act No. 292 is unconstitutional as being subversive of the constitutional right of local self-government.

"*Fourth.* That none of the people of the county of Muskegon are represented in any of the members of the committee on appeal, and that the act is void as violating the right of taxation without representation.

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"*Fifth.* That the members of the committee on appeal are not required to take the constitutional oath of office.

"*Sixth.* That the legislature had no authority to delegate judicial and administrative power to the committee on appeal, and therefore the act is unconstitutional.

"*Seventh.* That such committee on appeal is not such a fair and impartial tribunal as is contemplated by the Constitution and genius of our State government, and so is void.

"*Eighth.* That the committee on appeal has no power to subpœna witnesses, nor to inform itself in a judicial manner as to the relative value of all the taxable property in the county of Muskegon, and therefore the act is inoperative and void."

There are other questions sought to be raised in this court; but, as they were not presented in the court below, they will not be considered here.

It is unnecessary to discuss the questions involved, for the reason that all of them are controlled by the opinion in *Zimmer* v. *Board of Sup'rs of Bay Co.*, *ante*, 213 (123 N. W. 899).

The judgment of the court below is reversed.

BLAIR, C. J., and OSTRANDER, HOOKER, and BROOKE, JJ., concurred.

CITY OF DETROIT *v.* SNYDER.

EMINENT DOMAIN—DAMAGES AND COMPENSATION.

On motion for rehearing, an error contained in the opinion in this case, reported in 156 Mich. 511, is corrected, and the questions involved are held to be governed by *City of Detroit* v. *Railway*, 156 Mich. 106.

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Error to the recorder's court of Detroit, Connolly, J. Submitted January 22, 1909. (Docket Nos. 57, 58.) Decided May 25, 1909. Motion for rehearing submitted December 10, 1909. (Calendar No. 22,980.) Former opinion vacated December 30, 1909.

Petition by the city of Detroit for separation of grades in a certain street. George P. Snyder and the Union Transfer & Storage Company intervened claiming damages. A judgment confirming the award of the jury is reviewed by petitioner on writ of error. Reversed.

P. J. M. Hally, for the motion.

GRANT, J. Our attention has been called by a motion for rehearing to an error we made in the opinion in the case of *City of Detroit* v. *Snyder*, 156 Mich. 511 (121 N. W. 258).

We there said that, after eliminating the last item discussed, the award would otherwise stand affirmed: This was error, for which the writer of the opinion is responsible. It should read:

"That otherwise the cases of the respondents were ruled by the opinion in *City of Detroit* v. *Railway*, 156 Mich. 106 (120 N. W. 600)."

The question of damages and the instruction of the court as to the rule of damages were substantially the same in both cases, and the same result should have been announced in the latter opinion.

It follows that the judgment will be reversed, and a new trial ordered.

BLAIR, C. J., and MONTGOMERY, MOORE, and MCALVAY, JJ., concurred.

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STEWART v. CALHOUN CIRCUIT JUDGE.

1. INTOXICATING LIQUORS—STATUTES—LICENSE.
   A druggist may not lawfully sell intoxicating liquors to be drunk on the premises without paying the tax and obtaining the license required of retail dealers. 3 Comp. Laws, § 5379.

2. SAME—ILLEGALITY OF SALES—INFORMATION.
   A charge in an information that the defendant, a druggist, and person engaged in part in the sale of drugs and medicines, sold intoxicating liquors to be used as a beverage and drunk on the premises, sufficiently negatives the lawfulness of the sales.

Mandamus by Louis E. Stewart, prosecuting attorney of Calhoun county, to compel Walter H. North, circuit judge of Calhoun county, to set aside an order quashing an information: On motion for rehearing on the issuance of the writ. Submitted November 19, 1909. (Calendar No. 23,132.) Motion denied December 30, 1909.

D. C. Salisbury, for the motion.

Louis E. Stewart, contra.

HOOKER, J. This is a motion for rehearing in the case of *Stewart* v. *Calhoun Circuit Judge*, 156 Mich. 642 (121 N. W. 279). We held that the information filed in that case was a good information. It is now said that in so doing we have overruled the cases of *People* v. *Haas*, 79 Mich. 449 (44 N. W. 928); *People* v. *Decarie*, 80 Mich. 578 (45 N. W. 491), and *People* v. *Telford*, 56 Mich. 541 (23 N. W. 213). Had this defendant been charged with an act which a druggist might lawfully have done these cases would have some application. In the *Case of Telford*, an information based on a sale of liquor, accompanied by a failure to post a receipt for the liquor tax imposed on saloon keepers, was held bad for the very substantial reason that if he were a druggist he might have lawfully sold

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the liquors, no payment of tax being necessary by druggists selling in compliance with law. In *People* v. *Haas*, the defendant was charged with the selling and keeping for sale at retail intoxicating liquors without having posted the receipt and notice required by Act No. 313, Pub. Acts 1887. The *Telford Case* was followed, the case being similar. In the *Case of Decarie*, the conviction was for a failure to pay the tax required by the section of the statute last cited. As a druggist selling lawfully was not required to pay the tax, it was held necessary to show defendant's transgression by negativing the exception made by the statute.

In this case the defendant is charged with an act that could not have been lawful by a druggist or anybody else, viz., selling liquor to be drunk upon the premises as a beverage. Hence, under our decisions, it made no difference whether he was a druggist or not. Moreover the information did negative the possibility of his selling lawfully as a druggist by the following language:

"Being a druggist and a person engaged in a business in said city of Battle Creek consisting in part of the sale of drugs and medicines did then and there sell at retail, furnish and deliver to William Brant and W. B. Harkins a certain mixed liquor, to wit, 'high balls,' a part of which said mixed liquor was spirituous and intoxicating liquor, to wit, whisky, which said mixed liquor, a part of which was then and there spirituous and intoxicating liquor, was not so sold, furnished and delivered to the said William Brant and W. B. Harkins for medicinal, chemical, scientific, mechanical or sacramental purposes, but was so sold, furnished and delivered by the said William Peet to the said William Brant and W. B. Harkins to be used as a beverage and drunk on the premises and said spirituous and intoxicating liquor," etc.

The motion is denied.

OSTRANDER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

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RUCH v. RUCH.

1. SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—CONSIDERATION OF DEEDS—INNOCENT PURCHASERS.
   An oral contract of a parent not to convey real property owned by him, but to permit the land to descend to his heirs, in consideration of the executed conveyance by his wife to him of other real property, is enforceable in equity against a second wife, to whom he deeded the real property without consideration, in violation of his parol agreement, of which she had notice, relief in equity not being barred by the statute of frauds.
2. SAME—PAROL EVIDENCE RULE.
   Parol evidence is, under the established rule in this State, competent to show the actual consideration for deeds of land where the rights of innocent purchasers for a valuable consideration are not involved.
3. SAME—EVIDENCE—CONTRADICTING DEEDS.
   The expression of one consideration does not exclude proof of another and the actual consideration.
4. SAME—MORTGAGES.
   A deed may be shown to have been in fact a mortgage.

Appeal from St. Joseph; Yaple, J. Submitted June 10, 1909. (Docket No. 41.) Decided December 30, 1909.

Bill by Luther N. Ruch and William Ruch against Emma A. Ruch for the cancellation of a deed and the specific performance of a contract. From a decree for complainants, defendant appeals. Affirmed.

F. W. Knowlen and *M. L. Howell*, for complainants.

George H. Arnold and *H. O. Bliss*, for defendant.

Complainants are the children and sole heirs at law of Amos A. and Rosealtha Ruch, both deceased. Amos and

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Rosealtha were married in 1870. March 22, 1879, Rosealtha bought the W. ½ of the N. E. ¼, sec. 4, town 8 S., range 12 W., containing 80 acres. The consideration was $5,000 which she paid with her own money. April 26, 1889, she conveyed to her husband the south half of the 80 acres, for which he paid no consideration. Rosealtha died intestate April 25, 1900. The buildings were located on the north half of said land, and there Amos and Rosealtha lived until her death. On May 5, 1900, the complainants, by deed duly executed, conveyed to their father a life estate of said north half; the consideration expressed in the deed being $1 and love and affection. On April 9, 1903, he married the defendant. They lived upon, and received the entire use and benefit of, these 80 acres until his death, April 12, 1905. Seven days before he died he executed to the defendant a deed of the south half and a bill of sale of all his personal property. Complainants claim that the real consideration for the deed of the life estate was an agreement on the part of their father that upon his death the south 40 should be left to them. The bill sets forth the alleged agreement; charges defendant with knowledge of its existence at the time of her marriage; and prays that the deed to her be canceled, that the verbal contract be declared valid, and that the title to said land be vested in complainants. The case was heard upon pleadings and proofs taken in open court, except two depositions which were taken by stipulation. The court entered a decree for the complainants.

GRANT, J. (*after stating the facts*). The court found that Mr. Ruch's first wife purchased the 80 acres with her own money; that the deed by her to her husband of the south 40 was without consideration; that the deed of the life estate was made upon consideration that their father would, upon his death, leave it to them; that defendant before her marriage had knowledge of that contract; that the deed and bill of sale by Amos to the de-

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fendant were without consideration, and were received by her with full knowledge and notice of the contract between complainants and their father. The sole question of law raised in the case is whether the testimony of the wives of the complainants is admissible under the statute (section 10212, 3 Comp. Laws), as construed in *Laird* v. *Laird*, 115 Mich. 352 (73 N. W. 382). We need not determine this question, as it is not essential to the decision of the case.

Several disinterested witnesses testified that Amos Ruch told them that he had made such a contract with his sons. It is unnecessary to cite authorities to the proposition that parol contracts for the sale and conveyance of land, executed by one of the parties thereto, can be enforced against the other. In such cases two questions are always raised: (1) Was such a contract made? and (2) Did one party thereto execute it? In this case there is only one question, viz., Was the contract made? Or, stated otherwise, was the consideration for the deed of the life estate an agreement to leave the land to the complainants at his death? No conveyance by the father during his lifetime was essential. The agreement in substance was that he would not dispose of it, but would let the title remain in him, to go to them upon his death as his heirs at law. There are no superior equities on the part of the defendant appealing to the conscience of the court. The defendant had a farm of 80 acres near the land in question, and money in bank. She lived with her husband but two years. She was the sole witness in her own behalf. The learned circuit judge, who saw the witnesses, evidently believed the witnesses for the complainants. The evidence is ample to sustain the finding. A résumé of the testimony of the witnesses would be lengthy, and would furnish no precedent of particular value. The case is one purely of fact, and falls expressly within the principles of *Briggs* v. *Briggs*, 113 Mich. 371 (71 N. W. 632); *Pike* v. *Pike*, 121 Mich. 170

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(80 N. W. 5, 80 Am. St. Rep. 488); *Kleinow* v. *Kleinow*, 126 Mich. 365 (85 N. W. 1134).

The decree is affirmed, with costs.

After writing the above opinion, the question was raised at one of the consultations of the Justices, whether the case did not fall within the statute of frauds. We thereupon requested counsel for the respective parties to file briefs upon this point, and they have done so. The case was submitted to the court below upon the theory of the bill of complaint. The question of the statute of frauds was not presented to the court below, nor in the brief or oral arguments of counsel to this court. It appears from the certificate of the circuit judge that the case was settled under the statute, and that the record contains "all the evidence and exhibits produced on the trial in said cause which are necessary to a correct decision of said cause in the Supreme Court." The case was not settled with any view of raising the statute of frauds. Under this condition of the case, I was of the opinion that the question of the statute of frauds was not properly in the case, and should not now be considered, but that the case should be determined upon the record deliberately made by the parties and submitted to both the trial and appellate courts. My Brethren, however, who sat in the case, were of the opinion that we should dispose of this question, and I accede to their opinion.

Parol evidence is, under the established rule in this State, competent to show the actual consideration for deeds of land where the rights of innocent purchasers for a valuable consideration are not involved. *Ford* v. *Savage*, 111 Mich. 144 (69 N. W. 240); *Scovel* v. *City of Detroit*, *ante*, 95 (123 N. W. 569), and authorities there cited. The expression of one consideration does not exclude proof of another, and the real, consideration. *Carmichael* v. *Carmichael*, 72 Mich 76 (40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528). A deed absolute upon its face may be shown in fact to be a mortgage. In *Carmich-*

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ael v. *Carmichael*, the contract relied upon rested partly in writing and partly in parol. Contracts for the conveyance of land, though resting entirely in parol, have been repeatedly held by this court and others not to be within the statute of frauds where one party has executed the parol contract in whole or in part.

While, strictly speaking, the contract in the instant case was not a contract for sale, but a contract not to sell and convey, in construing it, we may apply the same rule as would be applied to a contract to sell. Briefly stated, the contract between the complainants and their father was that they would deed to him a life estate in the land they owned, provided he would agree not to convey the land which he owned, so that at his death the land would descend to them as his heirs. That contract was carried out on their part by the deed. He conveyed his land, in violation of the agreement, to one who knew of the existence of the parol contract, and who paid nothing for her deed. The statute of frauds cannot be invoked as a shield to protect such a fraud. The arms of equity are sufficiently long to reach such a case. *McClure* v. *Otrich*, 118 Ill. 320 (8 N. E. 784). Where a wife released her right of dower and homestead right by a deed under a parol agreement to convey to her another piece of land, the parol agreement was enforced. *Farwell* v. *Johnston*, 34 Mich. 342.

"When a verbal contract is performed by the conveyance of land on the one part, there can be no difficulty in compelling the equivalent from the other contracting party." *Holland* v. *Hoyt*, 14 Mich. 238.

Where a mother, the administratrix of her deceased husband's estate, obtained from some of her children a conveyance of all their interest in the estate, and orally agreed that in consideration thereof she would enjoy the estate for her life, and would leave it at her death to her children, and would make a will dividing it equally between them, and she did not carry out her agreement, but conveyed the estate in opposition thereto, the parol

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contract was enforced. *Stewart* v. *Smith*, 6 Cal. App. 152 (91 Pac. 667).

We therefore conclude and hold that the statute of frauds has no application to this case, and the decree of the court below must be affirmed.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

ORTON *v.* ORTON.

DIVORCE—EXTREME CRUELTY—ADULTERY.

An application for divorce on the ground of extreme cruelty, supported by sufficient testimony, may not be refused because the complainant had been twice previously divorced, and on the second occasion for her own fault.

Appeal from Wayne; Mandell, J. Submitted June 11, 1909. (Docket No. 71.) Decided December 30, 1909.

Bill by Ella Orton against John Orton for a divorce. From a decree dismissing the bill, complainant appeals. Reversed, and decree entered for complainant.

Lehman, Riggs & Lehman, for complainant.

MONTGOMERY, J. This is a suit for divorce on the ground of extreme cruelty on the part of the defendant. The proofs were taken in open court, and the bill dismissed; the complainant refusing to accept a decree for a limited divorce. The circuit judge found the extreme cruelty established by the proof, a conclusion in which we fully concur. It appears that the complainant had been twice married before. Her first marriage was dissolved

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by a decree of divorce upon a bill filed by her. The second marriage was dissolved on a bill filed by her husband. To that suit no defense was made, and a decree was entered granting an absolute divorce on August 19, 1907. Some four months later she married the defendant. The only question presented is whether, where a just cause for divorce is shown, the fact that the party applying for the divorce has been previously married and divorced, the former divorce having been on the ground of plaintiff's own fault, is to bar her from a divorce from the second marriage.

We assume that the first decree of divorce determined that she was not in fault and that her husband was. The second decree of divorce determined that she was in fault; but there were no restrictions placed upon her remarrying. Her status was fixed by that divorce as that of a single woman. We think it cannot be said that in a subsequent marriage she occupies a different relation than does any other married woman. It is true that the court might well scrutinize carefully her application for the purpose of determining whether a real ground of divorce has been made out. That, it appears, the circuit judge did to his own satisfaction, and became satisfied that she was entitled to relief, but seems to have proceeded upon the view that, because she had been unfortunate in previous matrimonial alliances, or had been guilty of fault herself in her second venture, she has debarred herself from the remedies which are open to other people. We think, on the contrary, that her second divorce fixed her status, and she had the same legal right to marry as though she had never been previously married, and she is entitled to equal protection in that marriage relation as though this were her first venture. If the case were less clear, the fact that she had had these experiences might be taken into account in determining whether a case had been made out; but there seems to be no question made that she has established a case entitling her to divorce if she is to be treated as is any other married woman.

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The decree should be reversed, and the decree of divorce granted.

BLAIR, C. J., and OSTRANDER, HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

GRANT, J. (*dissenting*). This is a suit for divorce on the ground of extreme cruelty on the part of the defendant. He made no defense in the court below, and has made none here. Proofs were taken in open court and the bill dismissed. The court offered to grant a limited divorce. Complainant refused to accept this, and insisted upon a decree of absolute divorce. The marriage to defendant was her third matrimonial venture. She obtained an absolute decree of divorce from her first husband; he making no defense. Her second husband filed a bill for a divorce against her, charging her with extreme cruelty and adultery. To that she made no defense, and a decree was entered granting the husband an absolute divorce on August 19, 1907. Four months thereafter she married defendant, after an acquaintance of only three months. On January 30, 1908, she filed this bill.

Section 8623, 3 Comp. Laws, authorizes a divorce "whenever, in the opinion of the court, the circumstances of the case shall be such that it will be discreet and proper so to do." Section 8622 authorizes a divorce from bed and board forever, or for a limited time. The court, in a written opinion, after stating her matrimonial career, said:

"I became convinced, from the consideration of these facts and circumstances, that the matrimonial and divorce career of complainant was shocking, and abhorrent to public morals, and that any further appeal on her part to the conscience of a court of equity should be viewed with suspicion. As I was satisfied that complainant had made out a case entitling her to some relief, I offered to grant her a divorce from bed and board forever as provided in section 8622, 3 Comp. Laws. This relief was refused on the ground that it was not appropriate, nor the relief sought. Thereupon I announced that a divorce from the

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bonds of matrimony would be refused for the reason that the circumstances of the case were not such that it would be discreet and proper to grant it. Section 8623, 3 Comp. Laws, as amended in 1907 (Act No. 324, Pub. Acts 1907). My reason for such denial was that this woman, who appeared to be 45 or 50 years of age, with prior matrimonial experience, did not present the case of an innocent woman being wronged in her marriage, without fault on her part. She took her husband for better or worse, and any proper and adequate care and investigation on her part would have shown her that her latest matrimonial venture could not be a happy one. Divorce laws were not passed for such as she, for to grant her an absolute divorce would give too much encouragement to that modern suggestion known as trial marriage, and would tend to destroy the accepted theory of the permanency of the married relation."

I fully concur in that opinion. This is not a suit at law or in chancery involving property rights of the parties litigant to which the rule of preponderance of evidence applies. This is a suit for divorce in which the public have an interest as well as the parties litigant. Regulations of marriage and divorce are under the control of the public through their legislature. The people have enacted laws providing for both. They have conferred upon the courts of chancery the sole jurisdiction in divorce cases, and have seen fit to lodge in those courts the power to grant divorce "whenever, in the opinion of the court, the circumstances of the case shall be such that it will be discreet and proper so to do." If the statute means anything, it means, in my opinion, that the courts are clothed with power to use a discretion in granting or refusing divorces. It eliminates the rule of preponderance of evidence and authorizes the courts to examine the character of the parties, the circumstances attending the marriage, the record of the parties in divorce suits, and authorizes the courts to refuse a decree in cases where it is apparent the complainant is an adventurer or adventuress in contracting the marriage relation. The record in this case shows the complainant to be such an adventuress. She has contracted marriage

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without any regard to its sacred relations or the solemn duties which that relation imposes upon the parties, and as lightly as she would make a contract involving property of little value. Divorced from one husband on her complaint, divorced from her second husband on his complaint charging infidelity to her marriage vows, divorced in August, married in December to a man after slight acquaintance, and applying for divorce in January—such is her record. Her present husband, from whom she now seeks divorce, appears to have been a worthless fellow addicted to intoxication. If she did not know this, an inquiry by her would have disclosed the fact; and, as the circuit judge said, "would have shown her that her last matrimonial venture could not be a happy one." We said, in *Sullivan* v. *Sullivan*, 112 Mich. 674 (71 N. W. 487): "We think that the character of the decree rests in the sound discretion of the court." In divorce suits in which the defendant does not appear, it is a fair presumption that he or she is entirely willing that a divorce should be granted, and is perhaps as anxious to be freed from the marriage as is the complainant. Both are undoubtedly often anxious for the divorce in order that they may marry again. It is easy in *pro confesso* cases either to manufacture testimony or to magnify little wrongs and unpleasant words, not of themselves sufficient to authorize divorce, into acts of extreme cruelty so as to bring the case within the statute. Appellate courts may review this discretion of the trial court, as was done in *Burlage* v. *Burlage*, 65 Mich. 624 (32 N. W. 866). In the case now before us I think that the court below exercised its discretion wisely, and tendered the complainant all the relief to which she was entitled. As the court below held, the evidence in such cases should be looked upon with suspicion. It is evident that the court below placed little confidence in the testimony of the witnesses, for in its decree the court held that "the material facts charged in said bill of complaint were not proven by the complainant."

The decree should be affirmed.

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SIMONS v. DIAMOND MATCH CO.[1]

1. DEEDS — COVENANTS — CONVEYANCING — INCUMBRANCES — REAL PROPERTY.
   An incumbrance, within the meaning of covenants in deeds, is defined as every right to or interest in the land, to the diminution of the value of the land, but consistent with the passing of the fee by conveyance.

2. SAME—LEASE AS INCUMBRANCE—LANDLORD AND TENANT.
   A term for years under a lease prior to the conveyance is an incumbrance, which is not excepted from the warranty by reason of the fact that the grantee knew of the outstanding lease.

3. SAME—PAROL EVIDENCE RULE—INCUMBRANCES.
   Evidence is inadmissible to show that an existing incumbrance was regarded in fact as no incumbrance.

4. SAME—LANDLORD AND TENANT—RENTS—RIGHT TO COLLECT.
   The right to collect reserved rent passes with the title.

5. SAME—COVENANT AGAINST INCUMBRANCES—PERSONAL NATURE.
   A covenant against incumbrances is personal, broken when made, and does not run with the land.

6. SAME—PAROL EVIDENCE—CONTEMPORANEOUS REPRESENTATIONS.
   Oral assurance that tenants in possession have no rights in the premises cannot add to or vary the warranties of a deed.

7. SAME—DAMAGES—ASSIGNEE OF RIGHTS UNDER COVENANTS.
   The assignee of rights for breach of the covenant against incumbrances takes only such right as the assignor had and is limited to nominal damages if the assignor was so limited.

8. SAME—COVENANT TO SEISIN.
   The covenant, if a breach occurs, is broken when made.

9. SAME—EVICTION—COVENANT FOR QUIET ENJOYMENT.
   An eviction of the grantee occurs when a deed is executed conveying land held under an outstanding lease, not excepted from its warranties.

10. SAME—RIGHTS TO GRANTEE—BREACH OF COVENANTS.
    One who has parted with his interest in land parts with his right to enforce the covenants in prior deeds, until he is made liable upon his own covenants and has satisfied his liability.

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[1] Rehearing pending.

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11. SAME—COVENANT FOR QUIET ENJOYMENT.
The covenant for quiet enjoyment is prospective, and until a breach occurs passes with the estate by descent or purchase.

12. SAME—LEASE—INCUMBRANCES.
An outstanding lease is in no instance a breach of the covenant of warranty and should in all cases be held to be a breach of the covenant against incumbrances.

Error to Wayne; Rohnert, J. Submitted October 7, 1909. (Docket No. 22.) Decided December 30, 1909.

Assumpsit by David W. Simons against the Diamond Match Company for breach of covenants in a deed. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed, and judgment entered for plaintiff for nominal damages only.

Geer, Williams, Martin & Butler, for appellant.

Charles C. Simons and *William J. Gray*, for appellee.

The facts which are here stated are not disputed. The owner of certain real estate incumbered by two mortgages, one dated March 25, 1896, the other November 15, 1897, leased various portions of the premises to tenants; one of the leases made December 9, 1898, being for the term of five years, another, running one year, with the privilege of two years, from July 1, 1899, and a third for five years, from January 15, 1899. The junior mortgage was foreclosed in chancery, and the property was purchased at foreclosure sale by one Scane, and he received the circuit court commissioner's deed therefor. The tenants were not made parties to the foreclosure proceeding. Later, the senior mortgage was foreclosed by advertisement, and the premises were conveyed to the defendant by sheriff's deed dated October 3, 1901. Scane quitclaimed to the defendant. By a deed dated January 24, 1902, acknowledged January 27, 1902, the defendant, an Illinois corporation, conveyed the premises to Burrows H. Rothwell

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by warranty deed. Rothwell, on January 29, 1902, conveyed the premises to the plaintiff by a warranty deed, subject to a mortgage, which Rothwell on the same day made to the Detroit Savings Bank, which the plaintiff assumed and agreed to pay. Meantime, the tenants above referred to occupied the premises. From them the defendant received rent, and it furnished to them heat and power, in accordance with the requirements of the respective leases. Both Rothwell and plaintiff knew how the premises were occupied, and were informed by defendant that the occupiers could remain only at the will of the owner, their leases having been avoided by the chancery foreclosure. Three of them declined to yield possession to plaintiff or to enter into new arrangements as his tenants. Notices to quit were served upon them, in which they were described as tenants under him. Proceedings were instituted February 24, 1902, before a circuit court commissioner to recover possession, and in the complaints which were filed plaintiff described himself as landlord and the occupiers as tenants under him. Judgments of restitution were rendered and were appealed from. In the circuit court one of the cases was tried and resulted in a judgment for defendant. That judgment was later affirmed in this court. *Simons* v. *Drill Co.*, 136 Mich. 592 (99 N. W. 862). Under date July 20, 1904, Rothwell, by an instrument in writing, sold and conveyed to plaintiff all his right and interest by reason of and under certain covenants of warranty in the deed from defendant to himself and all claims for damages and all rights of action arising out of any breach thereof. In 1907, plaintiff began this action in assumpsit. In his declaration, which contains a single count, he sets out his title, and of the deed from defendant to Rothwell it is averred that the defendant therein covenanted that it was well seised of the premises in fee, that they were free from all incumbrances, and that it would warrant and defend the same against lawful claims. He does not aver upon which of these three covenants he relies, nor,

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unless by inference, the breach of any of them. The assignment by Rothwell of his rights of action for any breach is averred, a demand for possession of the premises upon defendant, and upon the persons in possession thereof, and inability to secure such possession. The right in which the occupiers held the property, or claimed to do so, whether they claimed as tenants or under a paramount or adverse title, when and under what right they entered, none of these things is specifically averred, but the institution of proceedings to recover possession, the result thereof, is recited, and a reference is made generally to what the records of the circuit court commissioner, of the circuit court, and of this court in those proceedings will disclose. It is averred that those proceedings were instituted at the request and with the advice and assistance of defendant. The declaration proceeds:

"By reason of the said proceedings and the said judgments, the said plaintiff and his assignor were kept out of the possession of the said lands and premises, from, to wit, the twenty-seventh day of January, A. D. 1902, to, to wit, the third day of October, A. D. 1902, and that the said plaintiff and his assignor were put to great damage and expense by reason of said efforts to obtain possession and said failure to do so. Thereupon said defendant became obligated to plaintiff's assignor to pay to him the damages resulting from the breach of the said defendant's covenants in said deed, to wit, the sum of two thousand dollars ($2,000). And the said defendant, well knowing the premises, then and there promised to pay the said plaintiff's assignor the said sum of money on request, yet the defendant has disregarded its said promises," etc.

With the plea of the general issue the defendant gave notice that plaintiff's grantor and assignor, Rothwell, was duly adjudicated a bankrupt on January 19, 1903; that in his petition he did not list any claim against the defendant for breach of any of the covenants of the said deed; that on February 10, 1903, a trustee of the bankrupt's estate was duly appointed, who qualified and who became vested with title to all the property of said Rothwell, as of

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the date he was adjudicated a bankrupt; that said Rothwell did not give said trustee any information relative to any such claim against the defendant, and later, on March 30, 1903, he was discharged as a bankrupt; and that title to any such claim never revested in him. The trial of the action resulted in a verdict and judgment in favor of the plaintiff for $1,602.27, and upon this verdict judgment was entered. The verdict is based upon testimony of the rental value of the premises during the period plaintiff was kept out of possession. A motion for a new trial was duly made and was denied, for which denial the court assigned reasons in writing. The exceptions and the assignments of error based thereon raise, and the defendant, appellant, presents in this court, the following contentions:

(1) That the declaration wholly fails to state a cause of action.

(2) That the leases were terminated by the foreclosure of the second mortgage.

(3) That if the leases or the occupancy of the property under the leases constituted the breach of any of the covenants contained in the deed from defendant to Rothwell they were a breach of the covenant against incumbrances, and that the right of action for that breach did not pass to the plaintiff by the deed from Rothwell to him, and did not pass by the written assignment from Rothwell to the plaintiff because of the bankruptcy proceedings.

(4) That Rothwell sustained no substantial damage, for which reason plaintiff was in any event entitled to recover only nominal damages.

(5) That because it appears from the opinion of this court (136 Mich. 592 [99 N. W. 862]) that plaintiff failed to recover possession on account of not having given 30 days' notice to the tenants to quit he can recover only for 30 days' denial of possession.

OSTRANDER, J. (*after stating the facts*). The declaration does not by direct averment, or by the averment of facts or circumstances, allege or import a breach of any covenant in the deed from defendant to Rothwell. The averments may be held sufficient to supply, inferentially,

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the information that the premises were occupied at the time the said covenants were made. Employing this inference, they are sufficient to apprise defendant that the persons so occupying remained in possession after the deed was delivered to Rothwell, and that as against plaintiff their right to remain in possession was judicially determined. But in these averments no breach of any covenant is assigned. If it could be said that the averment that possession was demanded of defendant as well as of the occupiers is consistent only with the idea that defendant was unable to deliver possession, we are no better advised. The idea that an averment of eviction is to be found in the declaration is consistent only with the other idea that the deed to Rothwell conveyed the title to the premises and with the title constructive possession, since neither Rothwell nor plaintiff had actual possession. In this view of the matter, the covenant of warranty is not involved. And even if it should be assumed that the occupiers held under prior valid leases, and that the covenant against incumbrances was for that reason broken, it was broken when it was made. It is apparent, and is admitted, that the grantee, Rothwell, suffered nominal damages only. The contention is made that the testimony establishes the fact that plaintiff, and not Rothwell, was the real purchaser from defendant, and that therefore the covenants inured to the benefit of plaintiff. Clearly, no such theory as this is suggested in the declaration. In my opinion, the declaration is wholly bad, and the objection to receiving any testimony should have been sustained.

Some of my brethren do not agree with me, and are of opinion that, inasmuch as no demurrer to the declaration was interposed and a trial has been had, and especially because the declaration avers that the proceedings instituted by plaintiff to recover possession of the premises were so instituted at the request of defendant, and were conducted with the advice and assistance of defendant, we should treat the declaration as sufficiently averring a breach of

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one or more of the covenants in the deed from the defendant to Rothwell. The information obtained from the testimony is that the parties in possession of the premises had leases, for years, from a former proprietor. After the chancery foreclosure the tenants attorned to the defendant upon the terms of their respective leases. They declined to enter into new arrangements with plaintiff.

An incumbrance, within the meaning of covenants in deeds, has been broadly defined as "every right to, or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance" (*Prescott* v. *Trueman*, 4 Mass. 627, 629 [3 Am. Dec. 246]), used with approval by COOLEY, J., in *Post* v. *Campau*, 42 Mich. 90, 95 (3 N. W. 272). See, also, 2 Greenleaf on Evidence (16th Ed.), § 242; Rawle on Covenants for Title (5th Ed.), §§ 75, 76. It is believed not to have been the practice in this State to except from the operation of the covenant against incumbrances outstanding leases. Yet it is clear that a term for years, under a prior lease, falls within the definition, and such a lease has been held to be an incumbrance within the meaning of the covenant. Rawle on Covenants for Title (5th Ed.), §§ 77, 78; *Edwards* v. *Clark*, 83 Mich. 246 (47 N. W. 112, 10 L. R. A. 659). In some jurisdictions it is held that, where the purchaser accepts a covenant against incumbrances with knowledge of the tenant's possession and claim, the lease will not be considered a breach of the covenant. In this State, although the deed is held to pass to the purchaser, as an incident of the reversion, the right to collect the rent reserved in the outstanding lease, evidence is not admitted to show that an existing incumbrance was to be regarded in fact as no incumbrance. And one who purchased with knowledge, and who had the benefit of the leases, was denied relief in equity. *Haldane* v. *Sweet*, 55 Mich. 196 (20 N. W. 902). Whatever doubt may have at any time been cast upon the doctrine that a bare covenant that the premises demised "are free from all incumbrances whatever" is per-

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sonal, broken when made, if at all, and does not run with the land, no such doubt now exists. *Pease* v. *Warner*, 153 Mich. 140 (116 N. W. 994). There is testimony tending to prove that defendant assured plaintiff that the tenants in possession had no right to possession, and assisted plaintiff in his attempt to secure possession through legal proceedings. I know of no way to add these oral assurances to the written covenants in the deed from defendant to Rothwell, so as to extend or enlarge the effect of those covenants. The fact remains that defendant covenanted with Rothwell that the premises were free from all incumbrances. They were not. The covenant was broken, and Rothwell had his right of action. It is conceded that his damages were nominal. He assigned his right to plaintiff, who is limited in his recovery to such damages as Rothwell had suffered.

As to the covenant of seisin, it also was broken, if at all, when made, and Rothwell's right of action was an immediate one. It is contended, however, that a breach of the covenant of warranty is made out, and that this covenant is, as well, one for quiet enjoyment. It is conceded that, to constitute a breach of this covenant, there must be an eviction or a disturbance of possession under paramount title, and asserted that plaintiff's possession was disturbed when he was held out of possession by the tenants. Conceding, for the purposes of the argument, that the particular covenant may be treated as a covenant for quiet enjoyment (see *Peck* v. *Houghtaling*, 35 Mich. 127; Rawle on Covenants for Title [5th Ed.], § 114, and notes), if the outstanding lease was a breach of the covenant, it was broken—the eviction, if there was one, took place—when the deed from defendant to Rothwell was made. Rothwell was not let into possession. Assuming that he had, by virtue of his conveyance, the constructive possession, he was evicted. The paramount title was then asserted, and for the breach Rothwell had his right of action. True, the covenant is prospective in character, and, until breach occurs, passes with the estate by descent

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or purchase. But it is conceded that the right of action for the breach does not pass with a subsequent deed of the land. One who has parted with his interest in land parts with his right to enforce the covenants in his grantor's deed, or in prior deeds, at least, until he is made liable upon his own covenants and has satisfied his liability. These considerations do not afford the plaintiff any aid, and, in my opinion, they do support the proposition that an outstanding lease is in no instance a breach of the covenant of warranty, and should in all cases be held to be a breach of the covenant against incumbrances. Plaintiff's title is not assailed What he seeks is indemnity for a loss of the use of the property he owns. He does not choose to assert his demand against his immediate covenantor. His rights are in any event limited by the damages accruing to his assignor, Rothwell.

In the view of the matter which has been indicated, the other questions raised and discussed by counsel become unimportant. A judgment should have been directed for the plaintiff for nominal damages, with costs to defendant. The judgment of the court below is reversed, with costs of both courts, and a judgment will be entered in the court below for the plaintiff for nominal damages.

BLAIR, C. J., and GRANT, MONTGOMERY, and HOOKER, JJ., concurred.

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NORTHRUP *v.* CITY OF PONTIAC.

1. APPEAL AND ERROR — MOTION FOR NEW TRIAL — WEIGHT OF EVIDENCE.

   A verdict will not be set aside on the ground that it is against the weight of the evidence unless the question was presented to the trial court on motion for a new trial.

2. MUNICIPAL CORPORATIONS — SIDEWALKS AND CROSS-WALKS — DEFECTS—STREETS.

   A grating which projects two inches or less above a sidewalk is not such a defect as to violate the duty of a municipality to keep its streets and walks in a condition of reasonable safety.

Error to Oakland; Smith, J. Submitted October 13, 1909. (Docket No. 62.) Decided December 30, 1909.

Case by Henry C. Northrup against the city of Pontiac for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed, and no new trial ordered.

E. E. Hymers, for appellant.

Pelton & McGee, for appellee.

BROOKE, J. The plaintiff was injured by falling upon a sidewalk in the city of Pontiac, October 10, 1908. The sidewalk in question was more than 15 feet wide, constructed of cement, and was located upon the principal business street of the city. At the time the walk was constructed, some five or six years prior to the injury to plaintiff, a hole or area had been left therein in front of the premises No. 55 Saginaw street. This hole was located close to the building and was from the date of construction to the date of the injury covered by an iron grating, 3 feet, 4⅜ inches long, 23⅜ inches wide, and weighing 117½ pounds. The grating was provided with an iron flange projecting upon all its sides, about 1½ inches; the

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apparent purpose of the flange being to support the grating upon the surrounding walk when it was placed in the opening. In the work of construction, either the area was made too small to accommodate the grate or (if the grate was made for that particular opening) it was made too large, with the result that, instead of dropping into the area and being supported by the extending flange, the entire grate lay upon the walk, covering the area. This caused an obstruction at the point indicated, about 2 by 3 feet in superficial area, and above the level of the surrounding walk, at one corner, 1½ inches, and at another 1¾ inches. The plaintiff, who was very familiar with the situation, claimed that he caught his toe under the projecting flange, that he fell, and was injured. The accident occurred about 9:30 p. m. upon a rainy evening. Plaintiff had judgment.

The first assignment of error considered is that the verdict is against the weight of the evidence. This question was not raised upon the motion for a new trial, and cannot, therefore, now be considered. *Clarke* v. *Case*, 144 Mich. 148 (107 N. W. 893).

It is next urged that under the repeated decisions of this court the obstruction complained of, even conceding that it caused plaintiff's injury in the manner claimed, was not such as to render the walk not reasonably safe for public travel. The cases relied upon by appellant are *Weisse* v. *City of Detroit*, 105 Mich. 482 (63 N. W. 423); *Yotter* v. *City of Detroit*, 107 Mich. 4 (64 N. W. 743); *Shietart* v. *City of Detroit*, 108 Mich. 309 (66 N. W. 221); *Jackson* v. *City of Lansing*, 121 Mich. 279 (80 N. W. 8); *Urtel* v. *City of Flint*, 122 Mich. 65 (80 N. W. 991); *Bennett* v. *City of St. Joseph*, 146 Mich. 382 (109 N. W. 604); *McIntyre* v. *City of Kalamazoo*, 154 Mich. 301 (117 N. W. 729). The case of *Weisse* v. *City of Detroit*, *supra*, deals with a defective cross-walk, and therefore may be said to be not directly in point. The others, including *Yotter* v. *City of Detroit*, deal with defective sidewalks. A careful examination of all of them leads to

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the conclusion that the court has held, as a matter of law, that an inequality of two inches or less in a sidewalk does not render it not reasonably safe for public travel. It is obviously difficult to determine at just what point a jury should be permitted to pass upon the question. The case at bar, however, in our opinion, clearly falls within the rules laid down in the cases cited, *supra*. It is urged by the plaintiff that those cases should be distinguished from this case, because the defects complained of were (generally) depressions; whereas, we are here considering an obstruction by way of elevation. In our opinion the distinction cannot be made. There can be no depression without a corresponding elevation, and no elevation without a corresponding depression. One is the complement of the other.

It was not the intention of the legislature to impose upon the municipality a duty beyond that of keeping its streets and walks in a condition of *reasonable* safety. To permit a depression or elevation of two inches or less, we have held to be no breach of that duty. To permit a recovery in the case at bar would impose upon municipalities a higher degree of care and a larger responsibility than they have heretofore borne, and from which, under our decisions, they have had the right to assume they were immune. In the case of *Wedderburn* v. *City of Detroit*, 144 Mich. 684 (108 N. W. 102), relied upon, by plaintiff, the obstruction, a flagstone, was 3½ inches thick, an elevation just twice as great as the one in the case at bar. There this court held the question of the reasonableness of the condition to be one for the jury, and that determination was quite in harmony with the cases here considered.

The judgment is reversed, and, as there is no dispute as to the negligence relied upon, there will be no new trial.

BLAIR, C. J., and GRANT, and MCALVAY, JJ., concurred with BROOKE, J.

MOORE, J. I concur in the result.

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ULMER v. SEELMAN.

1. TRESPASS — ASSAULT AND BATTERY — JUSTIFICATION — HIGHWAYS.

In an action of trespass for throwing stones at the plaintiff and injuring him and for an assault with a shovel, the evidence showing that the plaintiff did not get out of the rig in which he rode, it is not a justification that the plaintiff drove out of the beaten track upon that portion of the highway cultivated by the defendant.

2. SAME — EVIDENCE — CHARACTER AND DISPOSITION — QUARRELSOMENESS.

Where a party claims in defense to an action of trespass for an assault that he was afraid of the plaintiff, because of the latter's reputation and quarrelsome disposition, it is error to exclude questions, on cross-examination of the defendant, which tend to show by specific instances his own disposition and reputation as to the same matters.

3. SAME—SELF-DEFENSE—EVIDENCE OF MALICE.

Testimony is improperly excluded which tends to show that the defendant bore ill will towards the plaintiff and his brother.

4. SAME—EVIDENCE—COLLATERAL ISSUES.

A question by defendant's attorney as to the defendant's condition and appearance since the death of his son by drowning attempts to introduce improper evidence.

5. SAME—HIGHWAYS—ASSAULT AND BATTERY.

Error was committed by the trial judge in charging the jury, as requested by the defendant, that the owner of land along a highway is entitled to its use to the center, subject to the usual rights of travel by the public, under evidence which showed that the defendant was not attempting to eject plaintiff as a trespasser or to defend his premises against a trespass.

6. TRIAL—JURY—IMPROPER CONDUCT OF PARTIES.

Improper conduct of a party with the jury, known to the other party to the action during the trial and not brought to the attention of the trial judge by objection or otherwise, is not ground for a reversal.

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Error to Ottawa; Padgham, J. Submitted October 13, 1909. (Docket No. 60.) Decided December 30, 1909.

Trespass *vi et armis* by John Ulmer against John Seelman. A judgment for defendant is reviewed by plaintiff on writ of error. Reversed.

Walter I. Lillie, for appellant.

George A. Farr, for appellee.

MCALVAY, J. Plaintiff brought suit against defendant for damages for personal injuries inflicted upon him by defendant, who, he charges, seriously assaulted him with stones, breaking a rib, and otherwise injuring him permanently. Defendant pleaded the general issue, and gave notice of self-defense in justification. That an altercation occurred between these parties, and that plaintiff's rib was broken and his face bruised by stones thrown at him by defendant, does not appear to be disputed.

These men were farmers in Ottawa county, living on farms a few miles apart. There had been some bad feeling between them. Plaintiff was driving along the highway in front of defendant's premises on May 8, 1907, when he met defendant, who was also in the highway with his team and wagon at work picking up stones. The highway at this place was not fenced, and defendant cultivated it up to the traveled track. Words were had between them, and plaintiff claims that defendant attempted to pull him from his buggy by the legs, and, becoming very angry, threw two large stones at him, hitting him on the side of his face, severely bruising it, and also striking him in the side and breaking a rib, and then assaulted him with a shovel. That he threw the stones by which plaintiff was injured is not denied, nor that plaintiff remained in his buggy during the difficulty. Plaintiff had worked on this day, May 8, 1907. He had drilled in 13 acres of oats on a farm some distance from his home. He took his

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dinner with him, and with it some hard cider. He finished this work at 4 o'clock in the afternoon, and took the borrowed drill to the home of the owner. He then started towards home with his team and buggy, and on his way passed defendant's farm, beyond which he stopped and talked with some acquaintances, at which time his former trouble with defendant was spoken of. While at this place he remembered that he needed mangel-wurzel seed, and started back for the village of Conklin to get it. There is evidence from these witnesses that the fact that he had been drinking was noticeable. Defendant's version of the affair is that plaintiff drove up, stopping on the cultivated land, and began to use threatening language towards him; that both of them called vile names; that plaintiff, while in the buggy, kicked at him, and threatened him, and arose in the buggy as if to get out, and he, in fear of great personal violence, picked up the stones and threw at plaintiff; that plaintiff afterwards circled twice around in his field and came back where he was, and he dodged to avoid being run over, and got the shovel, striking him as he went by the second time. Plaintiff claims that the blows from the stones rendered him unconscious, and when he came to himself the team was running away on defendant's field.

The result of the trial was a verdict of no cause of action, upon which a judgment was entered. Plaintiff moved for a new trial because of claimed improper conduct of defendant towards the jurors during the trial, because of the erroneous admission and rejection of testimony, and on account of errors in the charge of the court. This motion was denied, and the case is before us for review upon writ of error.

Errors are assigned upon the refusal to grant a new trial, and upon the rulings of the court during the trial of the case, and in charging the jury as above indicated. A large part of defendant's argument is taken up with a discussion of the question of the rights of an abutting owner in the highway passing along or through his prem-

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ises, where he cultivates up to the beaten track, and it would seem from defendant's requests and the charge of the court that the case turned largely upon the question as to whether or not plaintiff was a trespasser. This probably arises from the fact that defendant claims that plaintiff, when he came up to defendant in the highway, drove out of the beaten track in going around him. Plaintiff testifies that in passing he turned out in the proper way, but defendant turned out on the same side, and compelled him to turn out farther to get around him. If plaintiff was a trespasser in turnin g out from the track, and got beyond the limits of the highway, which is very doubtful, that would be no justification for the assault of defendant committed upon him, as stated in defendant's testimony. The record is undisputed that plaintiff was in his buggy alongside of defendant and his wagon and team from the time he drove up until after he had been hit with the stones. Both parties so testify. Defendant says he was on the ground picking up stones when plaintiff stopped his team and began in a threatening manner to use profane and vulgar language towards him; that he told plaintiff to drive on about his business. He testifies:

"I says, 'You may drive where you are a mind to.' He says, 'I don't care anything about that, all I am mad about is because you wanted a contract.'"

(This refers to a lease of some pasture, out of which bad feeling between them arose.) Defendant further says that he did not know what he meant or was going to talk about, for he had not spoken to him for three or four weeks. He testifies:

"I was scared half to death when he first got on there, because he didn't speak to me."

In order to get a clear understanding of his testimony it must all be read with care. From it we find that he claims plaintiff next rose up as if to jump out of the buggy and kicked at him, striking his hands and arms; that in dodging he fell backwards, and then took up the

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stones and hurled them at plaintiff. Then plaintiff drove away rapidly, circling around the field twice, and coming back both times to where defendant was, and he would have been run over had he not jumped out of the way. He went across the road and got a shovel and hit plaintiff across the back as he went by the second time. He also says he was physically a weak man.

Most of the errors assigned relate to the evidence excluded or admitted. We will consider such as appear of importance. During the trial defendant put in evidence tending to show the quarrelsome disposition and fighting propensities of plaintiff. Defendant had testified to plaintiff's disposition in that regard, and that he was afraid of him and "most scared to death" when he came there; that his heart thumped, and he did only what he thought necessary to protect himself. On cross-examination plaintiff's counsel sought to show defendant's disposition and reputation as to the same matters. This was not permitted by the court. We think this was proper cross-examination, as bearing upon the question whether or not defendant was in fact afraid of his life, and thrown into the condition he claimed on account of the presence of plaintiff, and as to his credibility. The questions called defendant's attention to specific instances. It was error not to allow the examination. It was material for the purpose offered.

Evidence offered tending to show malice and ill will on the part of defendant towards the Ulmers (being plaintiff and his brother) was objected to and excluded on the ground of incompetency and immateriality, and preliminary questions were stricken out, because two were included in the statements of defendant sought to be shown, and plaintiff was not personally named. This was error. If this testimony would show that plaintiff was one of the Ulmers towards whom he held malice or ill will, it would be material to the issue.

A doctor was being examined who had known defend-

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ant for six years, and testified that he looked to be a man in ill health. Witness was then asked whether he knew of the death of a son of defendant by drowning a year before. Plaintiff objected on account of immateriality, and was sustained. Counsel for defendant then stated that it was for the purpose of fixing a date. Witness was then asked:

"*Q.* What can you say as to his condition and appearance, doctor, since that tragedy?

"*A.* It is the condition he has been in ever since I have known him."

This question, subject to objection, was again asked in the same words, and was answered in the same words. Plaintiff's objections and exceptions to these questions and answers were timely, and the last objection was clearly well taken. The testimony was immaterial and improper.

Plaintiff excepted to two requests of defendant given to the jury. These requests are based upon the case of *People* v. *Foss*, 80 Mich. 559 (45 N. W. 480, 8 L. R. A. 472, 20 Am. St. Rep. 532), where grass along a highway within its limits and outside the beaten track was wantonly destroyed. It will not be necessary to quote them, for the reason that the assault and battery relied upon in this case was not committed in ejecting a trespasser or in defending premises against a trespass. The requests were improperly given.

Certain portions of the general charge are excepted to, but as no requests appear to have been presented by plaintiff in the case, and the attention of the court was not called to the part complained of, we do not consider the question.

The questions raised upon the motion for a new trial relative to the improper conduct of defendant towards members of the jury were based upon knowledge which plaintiff had during the course of the trial, and no objection was made, nor were the facts called to the attention of the trial judge. The plaintiff cannot complain under

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such circumstances. *Walker* v. *City of Ann Arbor*, 111 Mich. 4 (69 N. W. 87), and cases cited.

For the reasons herein stated, the judgment is reversed, and a new trial is granted.

BLAIR, C. J., and GRANT, MOORE, and BROOKE, JJ., concurred.

SCHULTZ v. DENNISON.

1. LANDLORD AND TENANT—CROP RENTS—TITLE.
   Under an agreement between the owner of land and a third person renting the ground on shares, and dividing in advance the corn to be planted on the premises by assigning to the owner every third row of shocks, beginning at the south side, the owner had title to such of the standing corn as in the course of good husbandry would be put into the first, fourth, etc., rows of shocks, without reference to any division by the tenant.

2. SAME—PARTITION—JOINT OWNERSHIP—VOLUNTARY NATURE OF PROCEEDINGS.
   Title to the landlord's interest passes to a joint owner who obtains his title to a portion of the rented real property by uncontested proceedings in partition, as by a voluntary conveyance without a reservation of the crops.

3. PARTITION—JOINT INTERESTS—CROPS.
   It is competent for the court to adjust the equities of parties to a partition proceeding in the decree.

4. ESTOPPEL—DECEIT—INTERESTS IN CROP.
   One who rents lands for a share of the crops determined specifically, by rows, in advance, is estopped to set up his agreement, in an action of trover for converting a portion of his share, against a defendant who took the interest of the lessor and appropriated a third of the crop in reliance on the tenant's statement that the owner was to have an undivided third of the corn.

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Error to Kent; Perkins, J. Submitted October 14, 1909. (Docket No. 89.) Decided December 30, 1909.

Trover by Lawrence Schultz against Ella R. Dennison. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Rodgers & Rodgers, for appellant.

Walker & Fitzgerald, for appellee.

BLAIR, J. This is an action of trover to recover the value of certain shocks of corn. On the 27th day of June, 1902, the defendant, Ella R. Dennison, was divorced from her husband, William H. Dennison, by decree of the circuit court for the county of Kent, in chancery. This decree, after setting off certain lands to the said Ella, left 80 acres of land to the said William. Subsequent to the making of the decree, the said Ella obtained title to an undivided one-half of the 80 acres through tax deeds. In 1906, and again in April, 1907, the plaintiff entered into cropping agreements with William H. Dennison. The agreement made in April, 1907, according to plaintiff's testimony, was as follows:

"* * * Told him I had come to rent the corn ground again. He said, 'All right.' He wanted to know what share I wanted. We said we thought he ought to have one-third. He said that would be all right. Then he wanted to know how—I wanted to know of him how we would divide it, and he said, 'Well, I want something as near—something like it was last year, so if I want some for my chickens and turkeys I can go and get a little before you husk it.' Then I says, 'We will commence on the south side, and you take the first row along the south side and leave me two, and you one, and so on across the field.' And he said that would be all right. Upon that agreement I went on and cultivated 10 acres of corn ground northeast of Mr. Dennison's house. Commenced to plant along the south side, what I term the first row running east and west. I raised a crop of corn on that 10 acres. I planted it, cultivated it, took care of

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it, and cut it. After it was cut I put it in shocks. I put 6 rows east and west into a row of shocks. There were 30-shock rows in the cornfield and 3 shocks over. There were 23 shocks in a row."

About the time of plaintiff's agreement with Dennison, the defendant instituted partition proceedings against Dennison in the circuit court, in chancery, which resulted in a final decree on July 1, 1907, setting off to the said Ella, among other lands, the 10 acres upon which the corn in question was then growing. A certified copy of this decree was served upon plaintiff prior to the alleged conversion of the corn. About the 10th of October, 1907, defendant, claiming to be entitled, under her partition deed, to Dennison's share of the corn, began to remove it, but took something less than one-third of the shocks. On the day she began removing it, she had a talk with plaintiff, which, according to his testimony, was as follows:

"Mrs. Dennison spoke, and she wanted to know what share of that corn Dennison got. I told her he got one-third, husked and put in the barn, and she says: 'He has taken 23 shocks. How does that come?' I says, 'I guess he has got a right to.' She says, 'Well, we are going to fix Dennison and take the corn.' I says, 'Are you?' And then Jim, Mr. James Hope, he spoke up, and he says, 'It don't do no good to serve papers on you folks.' He says he is going to take the ground share, no matter where we find it. My father, he says, 'You mean to say then you are going to take the boy's share?' And then Mrs. Dennison says, 'We are going to take the ground share, no matter where we find it.'"

Defendant did not take the first and fourth rows, and so on through the field, but took rows which plaintiff claimed were set apart and belonged to him under his agreement with Dennison.

At the close of the testimony, the circuit judge directed a verdict for defendant, on the grounds: (1) That her deed in partition gave her title to Dennison's share of the crop; and (2) that, in view of plaintiff's statement to her that Dennison's share was "one-third husked and put in

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the barn," he was estopped to rely upon the claimed agreement that he was to have the first and fourth rows of shocks and so on. Plaintiff brings the record to this court for review upon writ of error, contending that the court erred in holding that defendant acquired title to Dennison's share of the corn through her partition deed, for two reasons:

"(1) Because at the time the decree of partition was made the title to the land was in one person, and the title of the crops was in another person. This constituted a constructive severance of the crop of corn which made the corn personal property and prevented its passing with the land.

"(2) Because at the time the crop was sown the tenure or right of possession of William Dennison in this particular 10 acres of land was uncertain and indefinite. It having terminated by operation of law while the crop was growing, he would, for that reason, have the right of emblements; that is, the right to harvest his crop after the termination of his right of possession."

1. In support of this proposition it is argued: That William Dennison, being a joint owner of the land, in exclusive possession thereof at the time of the agreement with Schultz, was entitled to the crops raised thereon as against the other joint owner, citing note to *Le Barron* v. *Babcock*, 9 L. R. A. 625 (122 N. Y. 153, 25 N. E. 253). That, under his contract with Dennison, Schultz, as a cropper, was entitled to possession of the whole crop until it was divided, citing *Freese* v. *Arnold*, 99 Mich. 13 (57 N. W. 1038).

"Therefore, the title to the land being in Dennison, or, to say the most, being in William Dennison and Ella R. Dennison, and the title of the crops being in Schultz, or, to say the most, being in Schultz and William Dennison, we submit there was such a constructive severance as would render the crops personal property and prevent their passing with the title to the land on which they were grown."

In considering this proposition, it is to be borne in mind that no question is made as to the right of plaintiff to two-

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thirds of the corn. The only question is as to the title to Dennison's third. It is unnecessary to enter into a discussion of the technical relations of Schultz and Dennison for the purpose of determining their rights of title, possession, and division of the crop, since those rights, according to plaintiff, were determined in advance. In addition to the testimony as to the agreement above quoted, plaintiff testified as follows:

"*Q.* You said on direct examination that at the time you took the contract the corn was to be divided when cut and shocked. Why didn't you go down and divide it with Mr. Dennison or some one?

"*A.* There was no need of it.

"*Q.* Then it was not to be divided then, was it?

"*A.* It had already been divided.

"*Q.* Then what made you say that it was to be divided when it was cut and shocked?

"*A.* It was divided before it was cut and shocked; yes, sir.

"*Q.* Divided before the seed was sown?

"*A.* Yes, sir.

"*Q.* Divided before you turned a furrow, wasn't it?

"*A.* Yes, sir."

Plaintiff's father testified as follows:

"Lawrence told him he came up to rent the corn ground, as near as I can remember. He wanted to know what share he would give or wanted, and Mr. Dennison said one-third, husked and delivered, in the barn; and Mr. Dennison then wanted it so that he could get corn for early feeding for his chickens, and the boy says, 'Well,' he says, 'you can commence there along the lane on the south side and take the first row, leave me two, and take as much as you want to,' and Mr. Dennison says that would be all right, something. * * * In the year before the corn was divided equally, and he took the first row on the north side along the lane leading to the woods and left one, and so on."

As we understand the plaintiff's testimony, Dennison's share of the corn was set apart for and belonged to him, from the outset, regardless of the number of bushels of corn grown. Beginning at the south side of the field,

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Dennison owned so much of the growing or standing corn *in situ* as would, in the course of good husbandry, be put into the first, fourth, seventh, etc., rows of shocks. His title to the corn did not depend on a division to be made by Schultz or any one else. We are therefore of the opinion that the point is not well taken.

2. We regard this proposition as well founded, unless, as contended by counsel for defendant, the nature of partition proceedings is such that conveyances thereunder are to be considered as the voluntary act of all of the parties. If the defendant's title is to be regarded as the result of hostile proceedings against her co-tenant, the case is ruled by *McDaniels* v. *Walker*, 44 Mich. 83 (6 N. W. 112). The subpœna in the partition proceedings was personally served upon William H. Dennison. He put in no answer, and a *pro confesso* decree was entered against him. The final decree, confirming the report of the commissioners partitioning the land, must, we think, be given the same effect as though it was the result of the voluntary action of the parties in deeding to each other. 30 Cyc. p. 287, sub. *b;* 21 Am. & Eng. Enc. Law (2d Ed.), p. 1,209, § 12; *Campau* v. *Barnard*, 25 Mich. 381; *Tharp* v. *Allen*, 46 Mich. 389 (9 N. W. 443). It is competent for the court, in partition proceedings, to adjust the equities of the parties in the decree. *Fenton* v. *Miller*, 116 Mich. 45 (74 N. W. 384, 72 Am. St. Rep. 502). Mr. Dennison was at liberty to file an answer in the partition proceedings, setting up his interest in the growing crops, and the court had power to reserve such interest to him in the final decree. He took no steps to protect his interest in the crop, and it was cut off by the decree as effectively as though he had himself deeded the land to Mrs. Dennison without reservation.

It is also contended that the court erred in holding that plaintiff was estopped to set up the true agreement in support of his action. It appears from the plaintiff's own testimony that, knowing that defendant was inquiring of him as to Mr. Dennison's interest in the corn for the pur-

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pose of appropriating such interest, he deliberately deceived her as to such interest by suppressing the fact that Mr. Dennison was the owner of specific rows of shocks. We agree with the circuit judge that, having induced Mrs. Dennison to act upon his representation that Mr. Dennison was the owner of an undivided one-third of the corn, he was estopped to assert the contrary.

The judgment is affirmed.

GRANT, MOORE, MCALVAY, and BROOKE, JJ., concurred.

FROHLICH v. ASHTON.

1. MECHANICS' LIENS—OVERCHARGE—ESTOPPEL.
   A materialman who files a mechanic's lien is not estopped by the fact that, without bad faith, he claimed more than was due him.

2. SAME.
   Where the mistake in claiming a mechanic's lien for an excessive amount is an honest one, the lien is not lost.

3. SAME—DIVISIONS OF AMOUNTS AMONG CLAIMANTS.
   In determining the amounts to be paid each of the lienors, the cost of the building, where the contractor defaults and compels the owner to complete the building, includes not only liens which have been allowed but all unpaid creditors for material and labor furnished.

Appeal from Wayne; Donovan, J. Submitted October 14, 1909. (Docket No. 91.) Decided December 30, 1909.

Bill by Simon Frohlich against Laura M. Ashton, Abram Sapiro and others to enforce a mechanics' lien.

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From the decree rendered, defendants Ashton and Sapiro appeal. Modified and affirmed.

Lucking, Emmons & Helfman, for complainant.

Bernard B. Selling, for defendant Ashton.

Edwin S. Bartlett, for defendant Sapiro.

Covert & Berry, for defendant Howie Roofing Co.

Joseph H. Bayne, for defendants Guilloz and Touseau.

George M. Read, for defendant Forster.

O. E. Angstman, for defendant Weber.

MOORE, J. The bill of complaint was filed to foreclose a mechanic's lien. Six other lienors filed cross-bills for the same purpose. There is substantially no dispute of fact. The two questions raised relate solely to the method by which the balance owing by the owner is to be distributed among the lienors. The circuit judge rejected the lien of the Michigan Lumber Yard and made division of the money among the others. The owner subsequently purchased the rejected lien.

On July 14, 1906, Laura M. Ashton entered into a written contract with George L. Horning for the erection of a brick dwelling house for the sum of $5,750. The various lienors were subcontractors under Horning. When it was almost entirely completed, Mr. Horning abandoned the job, and Mrs. Ashton employed Mr. Vinton to complete the building, and paid him $25.20 for doing so. The owner, Mrs. Ashton, testified: That the contract price was $5,750; extras, $262.10; total, $6,012.10; that she had paid on the various accounts $5,332.92. She claimed slight deductions from the balances claimed by Frohlich Glass Company, Mr. Forster, and the Howie Roofing Company, which were allowed, and it was agreed by her and the lienors that the following was a correct statement of all the unpaid creditors, whether they were lienors or not:

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Name.	Amt. of Claim.	Amt. Paid.
1. Frolich Glass Co.	$1,124 08	$800 00
2. Samuel J. Guilloz	163 75	120 00
3. Richard J. Forster	219 14	100 00
4. Howie Roofing Company	142 05	40 00
5. White & Fisher	414 00	147 00
6. Kinney Electric Co.	99 00	50 00
7. John Bollin	2,050 00	2,000 00
8. Detroit Mantel & Tile Co.	82 00	
9. H. C. Weber	67 15	
10. Schneider & Carrol	229 00	100 00
11. Pittsburg Plate Glass Co.	27 18	
12. Michigan Lumber Yards	983 57	700 00

Numbers 6, 10, and 11 filed no liens. No. 12 filed a lien, but did not appear further in the proceeding. Payments were made without requiring the affidavit provided in section 1 of Act No. 17, Pub. Acts 1903. The Michigan Lumber Yard had guaranteed the performance of the original contract, and payments were made at the request of its manager to the contractor.

Counsel for the appellees contend as follows:

"Two questions are therefore presented:

"(1) Was the Michigan Lumber Yard estopped from participating in the distribution of funds remaining on hand?

"(2) In determining the percentage to which each of the lienors is entitled, should the cost of the building include only the liens which have been proved and allowed, or also all unpaid creditors, without regard to whether they have filed claims of lien at all, or, having filed the same, have neglected to prove them in this suit, to which they are parties?" and answers the first one in the affirmative and the second one by saying the cost of the building should be deemed for this purpose to include only the liens which have been proved and allowed.

In addition to the questions, the counsel for appellants contend that, as complainant in his affidavit made a claim for $45 in excess of his actual claim, he should be held to have lost his lien. There is nothing to indicate that complainant intentionally made a greater claim than was due.

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The difference is shown to have arisen out of an exchange or return of seven doors that were sent to the house. The rule has been stated to be that, where the mistake in claiming the lien is an honest one, the lien will not be lost. *Fairbairn* v. *Moody*, 116 Mich. 61 (74 N. W. 386, 75 N. W. 469); *Frohlich* v. *Carroll*, 127 Mich. 561 (86 N. W. 1034).

The other question is, How should the *pro rata* be computed? Should the cost of the building be held to include only the liens which should have been allowed, or should it be the actual cost? These questions are answered in the language of Justice CARPENTER in *Godfrey Lumber Co.* v. *Cole*, 151 Mich. 280 (114 N. W. 1018):

"Its counsel insist that in computing the cost of the building the trial court should not have considered payments made contrary to the provisions of section 10713, 3 Comp. Laws. We have never discussed this question; but we have decided it. We have held that such payments for labor or material actually used in construction are proper items in determining the cost of the building. *Delray Lumber Co.* v. *Keohane*, 132 Mich. 17 (92 N. W. 489); *Kotcher* v. *Perrin*, 149 Mich. 690 (113 N. W. 284). See, also, *Fairbairn* v. *Moody*, 116 Mich. 61 (74 N. W. 386, 75 N. W. 469), and *Smalley* v. *Gearing*, 121 Mich. 190 (79 N. W. 1114, 80 N. W. 797). See, also, Wilkinson on Mechanics' Liens, §§ 100, 101. It is conceded that if the owner had paid nothing, and all those who contributed labor and material asserted liens, complainant would receive precisely what this decree gives him. We are unable to see why it should receive more because the claimants were paid and paid before they asserted their liens. This method of computation deprives the owner of credit for, and compels him to lose, all that he has paid to the various laborers and materialmen in excess of their *pro rata* share as required by *Smalley* v. *Gearing*, *supra*. As applied in this case, it will compel defendant to pay $4,115.32 for houses which his contract entitled him to have for $3,500. Complainant as a lien claimant had a right to insist that the contract price be apportioned among the laborers and materialmen. Had such an apportionment been made, it would have all that it was entitled to receive. *Fairbairn*

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v. *Moody*, and *Kotcher* v. *Perrin*, *supra*. The decree appealed from gives complainant precisely what by such apportionment it is entitled to receive. This is equitable and legal and in accordance with our decisions. There is no merit in complainant's contention."

It follows that the computation made in the court below is erroneous, and the decree should be modified accordingly. The appellant will recover costs of this court.

BLAIR, C. J., and GRANT, MCALVAY, and BROOKE, JJ., concurred.

WEST v. DETROIT UNITED RAILWAY.

1. NEGLIGENCE—FORM OF ACTION — SURVIVAL ACT — WRONGFUL DEATH.

   A continuing injury, resulting in death within a few moments, is instantaneous within the meaning of the death act; 3 Comp. Laws, § 10427, and where an injured person continued to live for fifteen minutes after he was struck by a street car, being dead when removed from beneath it, the action should be brought under the death act and not the survival act.

2. SAME—CONTRIBUTORY NEGLIGENCE — STREET RAILWAYS—CUSTOMS IN OPERATION—REGULATIONS.

   While a pedestrian may rely, in crossing a street car track near its intersection with another track, on a custom or regulation to stop cars at a given place, the rule is not applicable to a decedent who, while engaged in conversation, attempted to cross in front of a car in plain view running at full speed, when a glance at it must have advised the deceased that it was not intended to observe the custom.

Error to Wayne; Lockwood, J., presiding. Submitted October 14, 1909. (Docket No. 86.) Decided December 30, 1909.

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Case by Mary F. West, administratrix of the estate of Charles L. West, deceased, against the Detroit United Railway for the negligent killing of plaintiff's intestate. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

Brennan, Donnelly & Van De Mark, for appellant.

Trevor & Bumps, for appellee.

On August 16, 1907, the day on which plaintiff's decedent lost his life, defendant company operated a double-track street railway on Gratiot avenue, Detroit. On and prior to that date Gratiot avenue was torn up for the purpose of repaving, and a temporary track was laid, south of the regular tracks, and within about four feet of the south curb, for the accommodation of east-bound cars. At the time of the accident, there were three tracks on Gratiot avenue where it intersects the East Grand boulevard. There were two temporary cross-overs, built across the tracks at this point, to accommodate traffic going north and south upon the boulevard. Decedent, in company with Philip West, his son, and Emil O. Basey, his son-in-law, was walking east on the south side of Gratiot. When they reached the boulevard, they desired to cross Gratiot, and attempted to do so, about 15 or 20 feet east of the west curb of the boulevard, south of Gratiot. Philip West and Basey were slightly in advance of decedent, and crossed in safety; but decedent was struck by an east-bound car. He was carried under the car and crushed, so that when taken out life was extinct. He was heard to groan for about 15 minutes after the accident. Decedent had resided in Detroit about two weeks.

BROOKE, J. (*after stating the facts*). Plaintiff's principal allegation of negligence is based upon the fact that the car which struck plaintiff's decedent did not stop at the westerly side of the boulevard, in violation of its duty so to do. It was the claim of plaintiff that decedent

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in crossing the track relied upon the custom of the east-bound cars to stop at the westerly side of the boulevard. Exhibits were introduced by defendant, at plaintiff's request, showing that on July 16 and 29, 1907, bulletins were issued by defendant requiring all cars to stop before crossing the boulevard. Testimony was introduced on the part of the plaintiff tending to show that plaintiff's deceased knew of the custom, having observed and remarked upon it a short time previously. On behalf of the defendant, it was shown that motormen were instructed by the division superintendent to disregard this order during the period of reconstruction, and stop at the point in the boulevard where the temporary crossings had been built. This, for the reason that passengers could neither conveniently board nor alight from the cars, except at said crossings, on account of the height of the step from the ground.

Three grounds for reversal are urged by defendant:

First. That the plaintiff has selected the wrong remedy. The action is planted upon the so-called "death act" (3 Comp. Laws, § 10427), and defendant contends that as, under the undisputed testimony, plaintiff's deceased continued to live for some 15 minutes after he was struck, though he was dead when taken from beneath the car, the appropriate remedy is under the survival act (3 Comp. Laws, § 10117), citing the case of *Olivier* v. *Street Railway Co.*, 134 Mich. 367 (96 N. W. 434, 104 Am. St. Rep. 607). We are of opinion that this case is distinct authority for the opposite view. Where there is a continuing injury, resulting in death within a few moments, it is "instantaneous" within the meaning of the statute.

It is next urged that no negligence was shown on the part of the defendant, and that plaintiff's decedent was guilty of contributory negligence, as a matter of law. We will discuss the latter question first. Emil O. Basey, the son-in-law, on cross-examination, testified as follows:

"When I crossed the track, I was about 15 or 20 feet east of the west curb of the south boulevard. The tem-

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porary track was about 3½ or 4½ feet from the south curb.

"*Q.* Just before you got to the track, if you and Mr. West had stopped, that car would have gone by, if you had stopped before stepping on the track?

"*A.* Yes.

"*Q.* As a matter of fact, it would, wouldn't it?

"*A.* Yes, sir.

"*Q.* The car was right there?

"*A.* Yes.

"*Q.* You stepped on the track, and the car hit Mr. West?

"*A.* Yes.

"*Q.* So probably the car was a very short distance from Mr. West when he stepped on the track?

"*A.* It was about, I should say about, 30 feet.

"*Q.* Coming at full speed!

"*A.* Coming at fair speed—regular speed. It was the speed as they generally run on Gratiot avenue there. I could not just exactly say what speed. I was ahead of the deceased, and Philip West was ahead of him. Philip West stepped upon the track first. He crossed it. I stepped on the track and just about got off by the time that the car struck Mr. West. The motorman did not stop at the boulevard. When the deceased was struck, I was up to the next track, about as far as the next track, about 4 feet. Mr. West was a little in back of me, about a step behind, so that just as Mr. West was stepping through the track the car hit him."

Philip G. West, the son, on direct examination, testified:

"We started catering across Gratiot avenue. We struck the temporary track about 15 or 20 feet east of the west curb of the boulevard south on Gratiot. Mr. Basey was between myself and father. I had not noticed a car coming until I was in between the rails of the temporary track. The car at that time was part way between the boulevard and Helen. It was nearer the boulevard than Helen, I could not say exactly how many feet.

"*Q.* Could you give us an estimate?

"*A.* Well, it might have been halfway between the boulevard and Helen.

"*Q.* You were on the temporary track at that time?

"*A.* Yes, sir.

"*Q.* Where was your father?

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"*A.* Why he was about getting onto the temporary track when I was in the middle of the track. We were about 15 feet east of the west curb of the boulevard. When my father was struck, I was just stepping onto the main track; that is, the permanent track.

"*Q.* About where was your father when he was struck?

"*A.* He was either stepping on, or had his foot on, the track. I could not say which. He was just stepping on the second rail when the fender of the car struck him. He fell backwards. The car ran between 75 and 125 feet after it struck him."

It is apparent from this testimony that the three men, engaged in conversation, attempted to cross in front of a car moving at full speed, in broad daylight, when it was in such close proximity that the most casual observation should have warned them of the danger. If, as testified to by Basey, the car was but 30 feet away, and running at full speed, when plaintiff's decedent stepped upon the track, it was then but 10 or 15 feet west of the westerly line of the boulevard, the point at which, according to plaintiff's contention, it should have stopped, in compliance with the rule. A car running at full speed cannot be stopped in such a short distance, and a glance must have advised plaintiff's decedent that no stop was intended by the motorman. He could not rely upon compliance with a rule or custom, of the instant breach of which he had actual notice. Evidence of a regulation or custom is admissible as bearing upon decedent's negligence. *McKernan* v. *Street Railway*, 138 Mich. 519 (101 N. W. 812, 68 L. R. A. 347), and cases cited. But there is no room for the application of testimony of this character where, as in the case at bar, the physical facts are such as to show beyond peradventure that plaintiff's decedent, in the exercise of the most ordinary prudence, could not have relied upon such custom or regulation.

Judgment reversed, and a new trial ordered.

BLAIR, C. J., and GRANT, MOORE, and MCALVAY, JJ., concurred.

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BROWN *v.* WARNER.

1. TAXATION—PARTITION FENCES — EXPENSES OF FENCE VIEWERS —STATUTES.
   A void tax for the expenses of fence viewers and repairs to a partition fence under 1 Comp. Laws, § 2415 *et seq.*, paid by the owner to whom it was assessed to the township treasurer under protest, is recoverable in assumpsit against the collecting officer in person.

2. SAME—ACTIONS—PARTIES.
   A tax collector is protected from all personal liability in collecting a tax under a warrant fair on its face.

3. SAME—SPECIAL ASSESSMENTS—LOCAL TAXES.
   Assessments for special or local purposes, not being within the rule, an action lies against the collector personally, where no other remedy at law exists.

Case made from Cass; Des Voignes, J. Submitted October 19, 1909. (Docket No. 123.) Decided December 30, 1909.

Assumpsit by Charles E. Brown against Albert L. Warner for money had and received. A judgment for plaintiff is reviewed by defendant on a case made. Affirmed.

Smith & Lyle, for appellant.

John R. Carr, for appellee.

MOORE, J. The plaintiff and one Isaac N. Snyder were the owners of adjoining farms, between which there was a line fence which was out of repair. Mr. Snyder applied to the fence viewers, under chapter 83, 1 Comp. Laws (sections 2415–2438), to require plaintiff to rebuild his portion of the fence. The fence viewers directed the plaintiff to rebuild his portion, which he refused to do, and it was afterwards built by Mr. Snyder. The fence

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viewers reported to the supervisor of the township, who spread the tax upon the assessment roll. In due course the tax roll and warrant were delivered to the defendant, who was township treasurer, and he proceeded to collect the tax of the plaintiff, who paid the same, under protest, to defendant as township treasurer. Plaintiff brought this case in assumpsit against the defendant personally to recover the tax. The brief of counsel for appellant states:

"The record presents the question whether a township treasurer is personally and individually liable in assumpsit for a tax collected by him as township treasurer under a warrant and tax roll regular on their face, where the tax is shown to be irregular on the trial."

The case is argued by the attorneys for appellant upon the assumption that the tax was void, that it was paid involuntarily, and that no protest was necessary. The case was tried before the circuit judge without a jury, who made certain findings of fact and conclusions of law. Among other things, he found the tax was void. He also found as follows:

"Afterwards the supervisor of the township of Newberg placed for the year 1907 the same upon the assessment roll in a separate column opposite of the land owned by the plaintiff, Charles E. Brown, in these words, 'Line fence $69.14,' and the warrant of that year attached to the roll of that year refers to this line fence and to the $69.14 as follows: 'Collect $69.14 for line fence,' 'Recapitulation: Line fence to I. N. Snyder $69.14.' The assessment roll for said township for the year 1907 has the figures $69.14 opposite the description of plaintiff's farm and under the dollar mark, and the words 'line fence' appear written in same column, and on the margin of the roll opposite the description are written the words, 'The within line fence tax of $69.14 is paid under protest.' The certificate contains these words: 'Expenses of Fence Viewers Isaac N. Snyder line fence, $69.14.' The warrant contains these words: 'Collect $69.14 for line fence.' 'Recapitulation: Line fence to I. N. Snyder, $69.14.'"

It is insisted by the appellant that the tax roll and warrant are regular on their face, and that the township treas-

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urer cannot be held liable personally for collecting a tax spread under such a roll. We quote:

"The rule that a tax collector is protected from all personal liability in collecting a tax under a warrant fair on its face is absolutely required for the due dispatch of public business. Cooley on Taxation (2d Ed.), p. 797."

Counsel cite *Moss* v. *Cummings*, 44 Mich. 359 (6 N. W. 843); *Aspell* v. *Hosbein*, 98 Mich. 121 (57 N. W. 27); *Curtiss* v. *Witt*, 110 Mich. 131 (67 N. W. 1106); and several cases from outside the State.

There is no serious controversy about the rule. The question is whether it is applicable to the facts disclosed by this record. The record shows upon its face that the tax levied is an unusual one, that it is for a local purpose, that it is to defray the expenses of fence viewers "Isaac N. Snyder line fence." In *Dawson* v. *Township of Aurelius*, 49 Mich. 479 (13 N. W. 824), in a case brought to collect a drain tax, it was held that the laying out of drains was a local matter, that the assessment made for the construction of a drain was a local assessment, and that in collecting the assessment the township treasurer is not acting as the agent of the township. To the same effect is *Camp* v. *Township of Algansee*, 50 Mich. 4 (14 N. W. 672). In *Anderson* v. *Hill*, 54 Mich. 477 (20 N. W. 549), plaintiff sued defendant to recover for a tax assessed against him which was assessed to pay for a work of internal improvement. The tax was paid under protest. In disposing of the case Justice CHAMPLIN, speaking for the court, used the following language:

"The first question to be considered is whether, if any action can be maintained at all, it should have been brought against the township, and not against defendant. The circuit judge so held in the court below. I do not see how the moneys raised under this act can be considered township moneys. They do not belong to the township, and the township authorities have no supervision or control over their expenditure. The same vote which determines to raise the moneys by tax appropriates them to the purpose specified in the act, and they are to be ex-

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pended under the supervision of the State board of control of State swamp lands. It is true, they are to be assessed and collected in the same manner as other township taxes are; but this does not make them township moneys. The State and county taxes are assessed and collected in the same manner as township taxes; but that does not make them township moneys. The language of the act merely directs the mode of assessing and collecting, and points out that the money so voted shall be assessed and collected in the same manner as other taxes in the township. The treasurer of the township is made the custodian of the money after he has collected it, until it is paid out or expended under the order and supervision of the State board of control of State swamp lands, simply because the law makes no other provision concerning it. In this respect the case is quite parallel to that of moneys raised for drainage purposes, which it was held were not township moneys, and the township was not liable therefor. *Dawson* v. *Township of Aurelius*, 49 Mich. 479 (13 N. W. 824); *Camp* v. *Township of Algansee*, 50 Mich. 4 (14 N. W. 672). If therefore the defendant has received and holds the money of the plaintiff under circumstances which render it inequitable that he should keep it, there is no good reason why an action for money had and received will not lie to recover it back. Indeed, if this is not the case, then there appears to be no remedy at law to enable a plaintiff to recover money under circumstances such as here disclosed."

See *Cox* v. *Welcher*, 68 Mich. 263 (36 N. W. 69, 13 Am. St. Rep. 339).

In *Taylor* v. *Township of Avon*, 73 Mich. 604 (41 N. W. 703), in an action to recover drain taxes paid under protest to the township treasurer, Justice CHAMPLIN wrote as follows:

"The objection is taken that this action will not lie against the township. The plaintiff, however, insists that it is authorized by section 42, Act No. 153, Pub. Acts 1885. This act is the general tax law for the assessment of property and levy of taxes for State, county, town, school, and highway purposes, and relates to no other kind of taxes. Section 42 applies only to the taxes authorized to be assessed by Act No. 153. Drain taxes for benefits do not come within the letter or spirit of this act.

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The taxes assessed for the construction of drains, as benefits derived to the lands assessed, are authorized, and the mode of procedure to assess and collect the same is provided for, in Act No. 227, Pub. Acts 1885. These taxes are special, and raised and set apart for a special purpose, and can be applied to no other. They are not raised by the township for any of the purposes for which township taxes are assessed and raised. When collected, they are held by the township treasurer subject to be paid out on the order of the drain commissioner, countersigned by the township clerk. The supervisor acts merely in a ministerial capacity in placing such taxes upon the tax roll of his township."

We think it follows from these cases: That the tax levied was a special tax levied for a local purpose; that in making the collection the defendant was not the agent of the township; and, as the tax is void, that plaintiff had a cause of action against defendant personally.

Judgment is affirmed.

GRANT, MONTGOMERY, OSTRANDER, and MCALVAY, JJ., concurred.

ROGERS *v.* PARKER.

1. NEGLIGENCE — MASTER AND SERVANT — INDEPENDENT CONTRACTOR—NEGLIGENCE IN SETTING FIRES.

   The owner of land who agrees with a tenant to pay a specified sum per acre for clearing his land, is not liable, as for the neglect of a servant, for damage done by the tenant in setting fires which escaped on adjacent property, the relation being that of an independent contractor.

2. SAME—INDEPENDENT CONTRACTOR—BURNING BRUSH, ETC.

   If the thing to be done is in itself unlawful, or if it is *per se* a nuisance, or if it cannot be done without doing damage, he

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who causes it to be done by another, be the latter servant, agent, or independent contractor, is as much liable for injuries which may happen to third persons from the act done as though he had done the act in person.[1]

3. SAME—NEGLIGENCE—ESCAPE OF FIRE.
Setting of fires in the process of cultivation is not unlawful.

4. SAME—STATUTES.
3 Comp. Laws, §§ 11653-11658, creates a liability for the escape of fires from the owner's premises, when it is the result of personal negligence or a wilful act.

Error to Grand Traverse; Mayne, J. Submitted October 15, 1909. (Docket No. 101.) Decided December 30, 1909.

Case by Martin Rogers and another against George W. Parker for negligently allowing fire to escape upon plaintiff's premises. A judgment for plaintiffs is reviewed by defendant on writ of error. Reversed.

John W. Patchin, for appellant.

Lester D. Welch, for appellees.

BLAIR, C. J. Action on the case to recover damages for destruction of property on plaintiffs' farm by fire alleged to have been negligently permitted to escape from defendant's premises. Defendant, being the owner of a tract of 80 acres, of which about one-half was cleared land, and the other half wild land, made a verbal arrangement with one Crawford, whereby Crawford was to crop the land for two-thirds of the crop. After Crawford had gone into possession, defendant agreed that "he would give me three dollars an acre for all the land I would clear." There was a conflict in the evidence as to whether the original agreement covered the entire 80 acres or only the cleared portion, and it was open to the jury to find that defendant retained control of the wild

[1] As to who are independent contractors, see note to *Richmond* v. *Sitterding* (Va.), 65 L. R. A. 445.

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land. There was no agreement binding Crawford to clear any specified amount or any amount of land, and there was testimony to the effect that defendant arranged with one Smith, with reference to this same wild land, that he could clear all the land he wanted for one crop. Plaintiffs' farm joined defendant's 80 acres on the north. Crawford cleared a few acres, and, in the course of his work, burned up the refuse, having fires going most of the spring, and there was a fire of his setting which escaped from the land being cleared, made its way across the intervening wild land to plaintiffs' land, and injured their property. Defendant testified:

"*Q.* State whether or not you knew at any time that Mr. Crawford was setting fires that were spreading, or liable to spread, on land that was not cleared.

"*A.* I didn't know that it was spreading. I knew that he was firing over there. It is a common method of clearing land in this country, after it has been logged and brushed, to set fires to the brush heaps and logs. No one had given me any notice during the summer that there were fires upon my land that were liable to spread upon theirs. I may have been to my place where Mr. Crawford was five or six times during the summer."

Defendant lived at the village of Kingsley, two miles from the farm, where he was engaged in conducting a general store. At the time plaintiffs' premises were fired, it was quite dry, and a high wind was blowing from the south.

At the close of plaintiff's testimony, and again at the close of the case, defendant's counsel moved for a directed verdict, upon the ground, among others, that defendant was not liable, because the negligence, if any, was that of an independent contractor who had exclusive control of the work. The court refused to direct a verdict, but instructed the jury upon this question as follows:

"Now, in relation to the independent contract, there is no question in this case but that, from all the evidence, Mr. Crawford was to receive three dollars per acre for what he did, and that he is a careful person, and if this

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land had been measured off and was adjoining the land of the plaintiff and the fire had escaped from the lands of the defendant, which this party had taken a contract to clear, directly upon the lands of the plaintiff, then there is no question but what the defendant would not be liable because there is no duty on his part to perform. Let us state that again, gentlemen, in another way: Suppose that this line between these two farms that these parties had fenced off a piece of land, and that the defendant had given Crawford an independent contract, under the circumstances which they claim in this case, to clear that land and fire had escaped from that land. Under these circumstances, I would have to direct you that there was no cause of action. But in this case there were no lands set off. There is a question whether Mr. Crawford was in actual possession of the unimproved lands, and actually the land which he did improve was some distance from the line, so that the fire, if you find it was the fire which came from the defendant's land and did the damage—that fire had to cross this land of defendant before it entered upon the land of the plaintiff, and that makes a different situation. It is for you to say, gentlemen—there is no question but what there was an independent contract—it is for you to say whether this intervening land was in the possession of Mr. Parker or in the actual and undisputed possession of Mr. Crawford. If Mr. Crawford was, for the time being, the owner of that land, by reason of the lease which was given for one year, then he would have no duty to be looking after it and anticipating that there was negligence on the part of Mr. Crawford. If, on the other hand, Mr. Parker was in the actual possession of that unimproved land, if he had it under his control and the lease did not cover it, as claimed by the plaintiff, then he would have a liability in the matter, provided you find that this fire escaped from this land which was being cleared upon this independent contract, upon the land of Mr. Parker—this unimproved land—and by his negligence escaped to the land of the plaintiffs."

Defendant brings the record to this court for review upon writ of error. We are of the opinion that the court erred in refusing to direct a verdict. The obligations of the parties under the arrangement to clear the land are not free from doubt, but defendant had licensed Crawford and Smith to clear up all of the wild land until he saw fit

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to revoke their license. Under this license, they could begin upon any part of the land. They could clear an acre here and an acre there, or they could employ a large force and clear it all in one season. Until defendant revoked their license, they had such charge and control of the land as was necessary to enable them to clear it all if they saw fit. But, assuming that defendant's relation to the uncleared wild land remained unchanged, was his negligence sufficiently established by the testimony? There was no testimony whatever to charge him with knowledge that there was any fire upon his portion of the wild land, and, if he is to be held responsible, it must be upon the principle that, knowing the dangerous character of fire and its liability to escape and do damage unless preventive measures are taken, he must see to it himself that such precautions are taken. To so hold would be to abolish the doctrine of independent contractor with relation to fires, a doctrine which has received the approval of the courts in many well-considered cases. *Shute* v. *Township of Princeton*, 58 Minn. 337 (59 N. W. 1050); *St. Louis, etc., R. Co.* v. *Yonley*, 53 Ark. 503 (14 S. W. 800, 9 L. R. A. 604); *Ferguson* v. *Hubbell*, 97 N. Y. 507 (49 Am. Rep. 544); *Gillson* v. *Railway Co.*, 33 U. C. Q. B. 128; same case on appeal, 35 U. C. Q. B. 475; *Kellogg* v. *Payne*, 21 Iowa, 575.

It is true that it has been repeatedly held that the rule relieving the employer where the work has been committed to an independent contractor is subject to the well-established exceptions that:

"If the thing to be done is in itself unlawful, or if it is *per se* a nuisance, or if it cannot be done without doing damage, he who causes it to be done by another, be the latter servant, agent, or independent contractor, is as much liable for injuries which may happen to third persons from the act done as though he had done the act in person. So it is the duty of every person who does in person, or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are

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taken, and he cannot escape this duty by turning the whole performance over to a contractor. Of the same nature is the duty which the law imposes upon every person, who, for his own purposes, brings on his lands, and collects or keeps there, anything likely to do mischief if it escapes, to keep it in at his peril; and if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape." Mechem on Agency, § 747, and cases cited.

These distinctions were considered in the cases above cited and were held, as we think, properly, not to apply. The setting of fires in this State in the process of fitting lands for cultivation is a lawful and proper act, without which the extension of husbandry would have been greatly limited. The statute upon which plaintiffs' count in this suit recognizes the lawfulness of such fires, and only makes the owner of lands responsible for the escape of fire therefrom to the lands of another where such escape was wilfully or negligently permitted. In other words, the statute recognizes that, if the work is properly done, no injurious consequences will follow, and therefore only holds the owner liable where the work has been improperly done. This statute came under consideration in the case of *Boyd* v. *Rice*, 38 Mich. 599. In that case, while James Boyd, the owner of a farm, was absent from the State, his servant, William Boyd, without his knowledge or previous instructions, set fire to a stubble field, from which it escaped to adjoining lands. In the course of the opinion by Mr. Justice COOLEY, it was said:

"But while the defendant William Rice [Boyd] might be subject to an action at the common law for his negligence, it seems plain that he cannot be liable under this statute. It was not from his premises that the fire was negligently permitted to spread; and, this statute carefully restricts its penalties to him who wilfully or negligently permits the fire to pass from 'his own woods, prairies, or grounds' to the injury of another. William Boyd was not within its provisions. But it is quite as plain that James Boyd was not liable for the act of William Boyd, of which he had no knowledge, and for which it is

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not pretended he was in fault. The private action for the recovery of double damages is only given where the misdemeanor has been committed, and there is no misdemeanor where the owner of the land has had no knowledge of the fire, and cannot be charged in respect to it with either wilfulness or negligence. He also may have been responsible at the common law for the fault of his servant, but the penal consequences are only imposed by this statute where there has been personal fault."

While plaintiffs did not claim double damages either in their original or amended declaration, and expressly waived such claim on the trial, they did amend their declaration so as to count on the statute, "being chapter 320, Compiled Laws of the State of Michigan of 1897, particularly sections 11653 and 11658 and all of the sections intervening." It seems evident that the liability of the owner of lands for negligently permitting fire to escape therefrom is predicated upon his knowledge of the existence of a fire thereon, or, at least, of knowledge of facts which would charge him with notice that the danger of such fire breaking out thereon was imminent. This record is barren of any such evidence, and a verdict should have been instructed for defendant.

The judgment is reversed, and a new trial granted.

GRANT, MOORE, MCALVAY, and BROOKE, JJ., concurred.

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PROVIDENCE JEWELRY CO. v. BAILEY.

1. SALES—ACCEPTANCE—FRAUD.
   Testimony is admissible under a notice in defense of an action for the price of goods sold, admitting delivery and acceptance and charging that the contract was secured by fraud; it being possible that the fraud was discovered after acceptance.

2. SAME—CONTRACTS—FRAUD—STATEMENTS INTERPRETING WRITTEN INSTRUMENTS—EVIDENCE.
   Representations of an agent who sells goods under a written contract, that the terms of the agreement give the purchaser fifteen days in which to accept the property, do not constitute such representations of existing material facts as to constitute an inducement on which reliance might be placed, and evidence of the statements is incompetent to vary the terms of the agreement.

3. SAME—PLEADING AND PRACTICE—WAIVING GENERAL ISSUE.
   A plea and notice which admit the right of the plaintiff to recover except for alleged fraud in the procurement of a contract for the sale of goods, and which claim the right to open and close the case, and waive the benefit of the general issue, admit the delivery and acceptance of the goods.

4. SAME—ACCEPTANCE—EVIDENCE OF GROUNDS OF REFUSAL.
   The statement in letters to the seller of the grounds on which the purchaser of goods relied in rejecting them is conclusive upon him, and constitutes a limitation of his defense to an action for the price.

Error to Van Buren; Des Voignes, J. Submitted October 15, 1909. (Docket No. 92.) Decided December 30, 1909.

Assumpsit by the Providence Jewelry Company against Ed. M. Bailey for goods sold and delivered. A judgment for plaintiff for less than the amount claimed is reviewed by it on writ of error. Reversed.

Carl Benton and *David Anderson*, for appellant.

Thomas J. Cavanaugh, for appellee.

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BLAIR, C. J. This is an action on a written contract for the sale of certain cheap jewelry, to recover the purchase price. Plaintiff's declaration counted upon the contract, and in alleging performance thereof avers "that defendant duly received and accepted said goods." Defendant, with his plea of the general issue, gave notice:

"That pursuant to Circuit Court Rule 24 *c*, the defendant hereby waives the benefit of the general issue, and admits the facts alleged in the plaintiff's declaration—that is to say, he admits that, except for the facts set forth in this notice, the plaintiff would be entitled to recover upon the allegations set forth in the declaration herein—and waives the necessity of the introduction of the contract described in the declaration, with a computation of the amount due thereon, hereby relying upon the defense herein set forth, and this defendant claims the benefit of said rule in respect to the opening and closing in the taking of testimony and in the argument at the trial of said cause."

The defense set forth in the notice was, in brief, that defendant's signature to the contract was obtained by fraud, and it was therefore void and unenforceable.

The contract contained, among other provisions, the following:

"Terms of Payment—Six per cent. discount for cash in 15 days, or one-fourth of the amount due in 3 months, one-fourth in 6 months, one-fourth in 9 months, one-fourth in 12 months, without interest. The above terms of credit will only be allowed if acceptances to our order are given within 15 days from date of invoice. Otherwise terms are net cash 30 days. Same terms shall apply on all reorders for these goods."

At the beginning of the testimony plaintiff's counsel objected to the introduction of any testimony under defendant's notice, upon the ground that defendant, having admitted acceptance of the goods delivered as a fulfillment of the contract, could not attack its validity. This objection was overruled. Defendant was allowed, against plaintiff's objection and exception, to testify as to the con-

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struction placed upon the portion of the contract, as to terms of payment above quoted by plaintiff's selling agent, that the contract gave him 15 days to examine the goods:

"I finally signed the contract with that understanding; that I was to have the goods and give me 15 days to look them over and then if they were satisfactory I could keep them, otherwise I could return them. When he showed me the contract, that particular feature of the contract protecting me, it read: 'Acceptances in fifteen days.' I says, 'This don't so state in your contract that I can accept the goods after fifteen days' examination.' He says: 'Yes, it does.' He picked it up. 'Well,' he says, 'It says "acceptances," but that is what it means; that is the expression; that is what that term means. It is put that way, but it means that you can have the goods in your care 15 days, and then if you want to keep them and write us and tell us you accept them, that is what that means if you do accept them. If you don't accept them, you can fire them back.'"

The goods were received by defendant on February 11, 1907, except some trays, concerning which defendant wrote plaintiff on February 18th, concluding his letter as follows:

"Furthermore, I don't think that I want to accept the goods in the form and manner which you send the 'acceptances.' They are too much like a note or draft. I will be willing to accept the plunder, but not by signing the drafts or notes. Awaiting your advice before putting the goods in the case, and awaiting your shipment of the trays, I beg leave to remain," etc.

Defendant testified that on February 19th he wrote another letter to plaintiff, which plaintiff's witnesses testified was never received. Defendant testified to the substance of this letter, as follows:

"In that first letter I wrote—I mentioned it was plunder, I think, and I wrote in the second letter that the jewelry, after examination, was nothing only junk and plunder, and I didn't think I cared to accept it under the form that they wanted me to at all, because I thought it was a fake deal from start to finish and they misrepresented it. It was along that line that I wrote them. I can't remember exactly my language, but the sense of it

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was that I did not want the goods, and they was a lot of junk and plunder and poor stuff, and while I would take them according to their contract, according to the agreement made with Mr. Duke, I was satisfied that they wouldn't do it that way, because it was a fake deal from start to finish. That was the sense of it and I haven't deviated from that standpoint since then."

Defendant further testified that he was satisfied in his own mind on the 19th of February that the goods were not as represented. In several subsequent letters defendant stated his position substantially as in his letter of March 13, 1907:

"I beg leave to advise you that I wrote you that I would accept the plunder under the conditions of the contract and agreement with your representative. There is nothing in the contract to signify that I was to give a note, which the form of drafts, which you sent me amount to. I have the mailing list made out, but before sending it, I will await your advice as to this term 'Acceptance,' and if you insist on the form of acceptance in the manner of notes, or certified drafts, I beg leave to advise that I cannot accept the goods that way, but I assure you that when the quarterly payments come due, you can notify me directly and the remittance will go forward to you at once."

On April 4th defendant wrote.

"I beg leave to advise you that I stand on the jewelry proposition *the same as I first wrote you*, that I would not accept the plunder only on the condition which I bought it. I will not honor the draft you mention, neither will I sign the drafts which you term 'Acceptances.' I will do as as I agreed to do; if that is not satisfactory, I will fire the goods back to you and pay you for what has been sold, which is very slight, and the case, I will buy of you or return as you wish. I explained the situation as I saw it when the goods came, but it appears to me that you have delayed the answering of that until the 15 days had expired for a purpose."

In reply to this last letter plaintiff wrote, in part:

"We do not see why there should be any misunderstanding in connection with this matter. The only objec-

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tion you raise is the signing acceptances. This is the only real objection, and this provision is clearly specified in the order, and it is absolutely necessary to do this if you wish to pay the account in four equal installments."

Thereupon, defendant wrote on June 10, 1907, as follows:

"Upon my return from the West I find your letters, and I beg leave to inform you that I am of the same mind about the plunder as I have previously stated to you, that I would not accept the goods in the manner and form as you desire, and I previously have advised you that if you still insisted that I was to sign the so-called 'Acceptances' that I would return the goods and hold the showcase and trays for your advice as to disposition of the same, or I would purchase the case if your price was reasonable, and conforming to the same I have returned the jewelry with the exception of $10.88 worth, which has been sold, awaiting your conformity to my terms written to you many times."

At the close of the testimony, plaintiff moved for a verdict in its favor, upon the ground, among others, that defendant, having based his refusal to accept the goods upon his claim that the contract did not require him to give the acceptances demanded, could not rely upon any other ground. This point was also raised by requests to charge. The circuit judge submitted the case to the jury, who found a verdict for defendant, and plaintiff has removed the record to this court for review upon writ of error.

We are of the opinion that the court did not err in overruling plaintiff's objection to the taking of any testimony, since, although there was an acceptance of the goods, the fraud might only have been discoverable after the acceptance.

We think, however, that the court erred in permitting testimony as to the agent's explanation of the meaning of the clause as to terms of payment, for the reasons:

(1) That the statements of the agent in this regard were not such representations of existing material facts as to

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constitute an inducement upon which defendant had a right to rely, and were incompetent, as tending to vary the terms of the written contract. *Tradesman Co.* v. *Manufacturing Co.*, 147 Mich. 702 (111 N. W. 343, 112 N. W. 708).

(2) That defendant, by its pleading, admitted an acceptance of the goods.

We do not consider it important whether the plaintiff was required, by the rules of pleading, to aver an acceptance in its declaration and prove it upon the trial. It was certainly a material fact in plaintiff's case, which it might properly aver in its declaration. In effect, plaintiff averred in the declaration that it delivered the goods to defendant, and that defendant, having the right to examine the goods to ascertain whether they were in compliance with the contract, and being under the duty to so examine them, and having the right to refuse to accept them if not in fulfillment of the contract, or for other good reason, did accept them as in fulfillment of the contract, and as obligating defendant to pay the purchase price. We hold, therefore, that by his plea defendant admitted the fact of an acceptance, with the effect which the law attaches to such acceptance.

We are also of the opinion that the court erred in refusing to instruct the jury that defendant was limited to the cause of complaint stated in his letters, and that, such cause of complaint not being sufficient in law to warrant a refusal to accept, plaintiff was entitled to recover the contract price.

Conceding that the jury might find that defendant wrote and properly mailed the letter of February 19th, which he afterwards ignored, and which defendant's officers testified was never received, his subsequent letters conclusively show that the statements of that letter were not the basis of his claim of right to refuse acceptance. Two letters from defendant were put in evidence, dated, respectively, February 18th and March 13th, stating defendant's objections. The letter of March 13th plainly refers to the let-

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ter of February 18th for the statement of his claim. In a letter written by defendant on March 27th, he says: "I wrote you twice that I would accept the goods which is all that your contract implies," etc. At the date of this letter, he had written three letters, counting the letter of February 19th, but apparently only relies upon the two put in evidence. In his letter of April 4th he says that he stands on the jewelry proposition "the same as I first wrote you," etc. Having clearly notified plaintiff of the ground upon which he stood, he could not be permitted to rely upon other grounds upon the trial. *Ginn* v. *Coal Co.*, 143 Mich. 84 (106 N. W. 867, 107 N. W. 904).

The judgment is reversed, and a new trial granted.

GRANT, MOORE, MCALVAY, and BROOKE, JJ., concurred.

FORBES *v.* GORMAN.

1. LANDLORD AND TENANT — LEASE OF PORTION OF BUILDING — RIGHT TO USE OF ROOF.

   The lease by the owner of a building consisting of several stories, to a merchant, of the first story and basement for use in his business, with license to use the roof for a sign or signs, confers no right to sublet the privilege of using the roof to another person to advertise a separate business, but merely a personal right to advertise the business carried on under the lease.

2. SAME—RIGHT TO USE OF OUTSIDE OF BUILDING.

   The lessee of one story of a building obtains the right to use the premises, including the outer and inner walls, for all purposes not inconsistent with the lease, and may put any sign or signs on the walls which work no injury to the freehold.

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3. SAME—RIGHTS BY ESTOPPEL.

No right is acquired by estoppel in favor of a tenant who permits a third person for a specified rent to erect a sign on the roof of a building of which he rents a portion, against the owner whose agent discovers the sign in process of erection, and who was not informed of the purpose or compensation for the arrangement.

Appeal from Wayne; Murphy, J. Submitted October 15, 1909. (Docket No. 97.) Decided December 30, 1909.

Bill by Jeanette Fisher Forbes against John J. Gorman and Walker & Company for an accounting. From a decree for complainant, defendant Gorman appeals. Affirmed.

Codd & Hall (*Earl F. Drake*, of counsel), for complainant.

Navin, Sheahan & Bourke, for appellant.

The bill in this case alleges that complainant was the owner of a building in Detroit, known as the "Fisher Building," situated at the corner of Lafayette and Michigan avenues; that on June 30, 1902, she leased to one Leon Higer the first floor and basement of said building for five years, "to be occupied for the sale of clothing, gents' furnishing goods, hats, caps, boots, and shoes, and such articles as are usually handled and sold in said lines of business;" that said lease contained the following provisions:

"Said second party covenants that he will not assign or transfer this lease, or sublet said premises, or any part thereof, for any business more hazardous or reasonably objectionable, than that hereinbefore mentioned, without the written consent of the first party. * * *

"It is agreed between the parties hereto that said second party shall be privileged to place and maintain an electric or other sign or signs on the outside of said building, overhead the premises occupied by them, and on the top of said building, during the existence of this lease, and any renewal thereof, provided, however, that said

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sign or signs shall be placed so as not to interfere with other tenants in said building, in the use and occupation thereof leased to them."

That said Higer assigned said lease to the defendant Gorman on March 6, 1905; that said Gorman, at some date unknown to the complainant, made a contract with the defendant Walker & Co., a corporation, purporting to convey to said Walker & Co. the right to place upon the top of said building a conspicuous electric sign of "Wilson Whiskey;" that said Gorman assumed to rent space upon the roof of the building for that purpose, and received pay therefor; that said defendant Gorman refused to inform complainant of the terms of said contract or the amount of compensation he received from Walker & Co.; that said lease to said Higer contemplated and permitted him, or his assigns, to place upon the roof of said building a sign in connection with the business of said Higer, or his assigns, but for no other purpose. Complainant filed this bill to obtain an accounting of the amounts paid or due under the alleged and suppressed contract between the defendants, claiming that the said amounts belonged to her. Defendant Gorman answered, admitting all the material allegations of the bill except as to the construction placed upon the lease by the complainant, and promised to produce upon the hearing his contract with the defendant Walker & Co. He further alleges that the sign was erected with the consent of complainant's agent. The case was heard upon pleadings and proofs taken in open court, and a decree entered for the complainant.

GRANT, J. (*after stating the facts*). 1. It is agreed by counsel for both parties that the "privilege" mentioned in the lease to Higer was a mere license. Counsel for the defendants, in opening their case to the court below, stated their position to be that the privilege granted to erect a sign or signs "was not a part of the lease or subletting or anything else, but that its erection was sanctioned by Mrs.

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Forbes through her agent, and that she is therefore estopped to complain." Walker & Co. is a corporation organized for carrying on an advertising agency. The sign has no connection with the defendant Gorman's business. The contract between the defendants recited that the defendant Gorman was the lessee of the main floor and roof of the building. It was executed with all the formalities of a lease and was to continue two years, with the privilege of a third year, at a rental of $450 per annum.

The first and decisive question presented is, What is the nature of the privilege or license granted by the lease? If defendant's contention be sustained, the lessee acquired the entire use and control of the roof of this building, provided only that he should not interfere with the occupancy of the tenants of the floors above the basement and first story leased by him, and he could sell and convey the right of advertisement to other parties, and thus cover the entire roof with signs. We think the only construction that can be placed upon this provision of the lease is that the right to maintain such a sign or signs was a personal privilege granted to the lessee, or his assignee, to advertise the business to be carried on by the tenant. It was a privilege incidental to his business. The very language of the lease refutes the idea that the landlord was leasing the roof of this building to the lessee for the purpose of profit aside from that which might result from advertising his own business. The lessee was given no dominion over the roof; was under no obligation to keep it in repair. He simply secured the privilege of putting a sign on it. The lease of a building, or of one floor or story thereof, conveys to the lessee the absolute dominion over the premises leased, including the outer as well as the inner walls. Such lessee obtains the right, in the absence of restrictions, to use such premises, including the walls, for all purposes not inconsistent with the lease. He acquires the right to the use of the outer walls, and can put any sign or signs thereon which work no injury to the freehold. The landlord in such a lease retains no

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right to permit signs or advertisements of other parties to be placed upon the outside walls of the leased building. Otherwise, he might permit the sign of a competitor in business to be placed upon the wall. Such use would be repugnant to the plain terms of the lease. *Lowell* v. *Strahan*, 145 Mass. 1 (12 N. E. 401, 1 Am. St. Rep. 422). It was there held that the outer wall was a part of the premises leased. A similar case is *Riddle* v. *Littlefield*, 53 N. H. 503 (16 Am. Rep. 388). It is there said:

"The outside wall of a building leased or conveyed passes by the lease or deed as much as the inside of the same wall. * * * The outer side of the wall is but one side of the same wall that has an inner side; and the removal of the wall removes both sides. If, then, a lessee or grantee may have the wall which he pays for, it would seem that he should be entitled to the use of it, not only for purposes indispensable to the occupation of the building, but also for any purpose of service or profit not inconsistent with the lawful and reasonable enjoyment of the property."

There is another class of cases wherein the owner of buildings or lands, by express contract, rents to the contractee the use of fences, or the outside walls of buildings, for the express purpose of advertising. Such cases are *R. J. Gunning Co.* v. *Cusack*, 50 Ill. App. 290; *Willoughby* v. *Lawrence*, 116 Ill. 11 (4 N. E. 356, 56 Am. Rep. 758). These and similar cases do not touch the question in the case now before us, a question which counsel concede has not before been presented to this court. Neither is any case cited from other courts "on all fours" with this. See, also, 14 Cyc. p. 1206; *Morrill* v. *Mackman*, 24 Mich. 279 (9 Am. Rep. 124). It seems to us unreasonable to construe this lease as conveying to the lessee of the lower story the sole use of the roof of the building for his own profit. The use of the roof for any purpose was not essential to the full enjoyment of his lease. He was only permitted, if he chose to exercise it, the privilege of putting up a sign, or signs, in connection with his own business.

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No question arises upon the right to put signs, for any purpose, on the outside or inside walls of that part of the building leased to the defendant. No reference is made to such use of the walls in the lease. That right, as above stated, follows from the grant, conveyed by the lease. It in no manner affects the separate and distinct privilege to place a sign or signs upon the roof, which is not leased to the lessee of the basement and first floor.

2. There is no room in this case for the application of the doctrine of estoppel, even if such right could be obtained by parol. Neither the complainant nor her agent had any knowledge of the intention to erect this sign until it was in process of erection. Her agent, in passing the building, discovered what was being done. He at once applied to complainant's attorney for the construction of the lease, and was informed that defendant Gorman had no right to erect or permit the erection of the sign. Defendant Gorman was so informed. He did not inform complainant of his intention, or of his contract with the defendant Walker & Co., but acted in opposition to her rights under the lease. And when her agent accidentally discovered the sign in process of erection, Gorman did not inform him that he claimed the right, under his lease, to permit the erection of this sign, or that he was to receive any compensation from Walker & Co. for it. He is not in position, therefore, to raise the question of estoppel.

The decree is affirmed, with costs.

BLAIR, C. J., and OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

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SCOTT v. SULLIVAN.

1. CONTRACTS—CONSTRUCTION—LOGGING AGREEMENTS.
   In a permit to cut timber, clauses conveying the right to cut and remove the timber for fifteen years, for the use of the grantee, from the lands of the grantor, and to have and "to hold the same for the period aforesaid to the use and benefit" of the grantee, the contract designating the parties as licensor and licensee, constituted a license to cut and remove the timber, title to which would pass after it should be cut and removed.

2. SAME—CONDITIONS PRECEDENT—PERFORMANCE.
   Under a condition in such contract that a failure to pay certain taxes should operate as a surrender, cancellation or abandonment of all rights under the contract, and time should be of the essence of the agreement, a failure for three successive years to pay the taxes within the time limited terminates all rights under it as for a breach of a condition precedent.

3. SAME—INCONSISTENT THEORIES—ELECTION OF RIGHTS.
   A party who insists that no forfeiture has taken place may not claim relief by amended pleadings, upon the inconsistent theory that equity will relieve from a forfeiture upon the tender of performance within the terms of the contract.

4. SAME—FORFEITURE—RELIEF IN EQUITY.
   No meritorious case warranting equitable relief from the forfeiture of rights under the agreement is made by testimony showing that the party in default forgot the time allowed to him under his license, and delayed performance after notice of his default, because it would be inconvenient to make the required payments.

Appeal from Ontonagon; Cooper, J. Submitted October 20, 1909. (Docket No. 130.) Decided December 30, 1909.

Bill by Emmet H. Scott against Thomas G. Sullivan and others for the foreclosure of a mortgage. W. B. Blake and others intervened, claiming title by virtue of certain tax deeds. From a decree for complainant, said

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interveners appeal. Reversed, and decree entered for interveners.

A. B. Eldredge and *A. E. Miller*, for complainant.

William G. Fitzpatrick, for defendant Sullivan.

Ball & Stone (*A. W. Lamson*, of counsel), for appellants.

MCALVAY, J. The bill of complaint in this case was filed for the purpose of foreclosing a certain mortgage given by defendant Sullivan to complainant November 8, 1905, upon 2,040 acres of land of which he was owner in fee, and the timber on 3,520 acres of other land. All of this land was situated in Ontonagon county. The Prather Engineering Company and Edward W. Glynn, trustee, were made defendants, being second mortgagees. W. B. Blake and the other intervening defendants, claiming title in fee to these lands last described and the timber thereon, petitioned and were allowed to intervene, and file their answer and cross-bill. The complainant and defendant Sullivan answered this cross-bill. The defendants Prather Engineering Company and Glynn, trustee, answered the original bill. Glynn, trustee, demurred to the answer and cross-bill of the intervening defendants, and also to the answer of Prather Engineering Company, which by amendment asked affirmative relief against intervening defendants. The original bill was taken as confessed against defendant Sullivan. The various issues joined upon the above pleadings were heard together, and a decree was rendered in favor of complainant and defendant Sullivan, granting foreclosure of the mortgage, and denying the relief prayed by the intervening defendants in their answer and cross-bill. The controversy relates to the timber claimed by Sullivan through assignments hereinafter described, and is the timber included in the mortgage to complainant.

On September 9, 1902, the Wilmot Mining Company, a Michigan corporation, which was the owner of lands de-

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scribed in the pleadings, having theretofore sold all of the pine timber thereon to Charles F. Button with the right to cut the same within a certain time, made, executed, and delivered to John Burns the following instrument in writing:

"Know all men by these presents, that the Wilmot Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, party of the first part, for and in consideration of the sum of seven thousand five hundred and forty ($7,540.00) dollars, to it in hand paid, the receipt whereof is hereby acknowledged, has bargained and sold, and by these presents does bargain, sell, grant and convey to John Burns, of the city of Ashland, State of Wisconsin, party of the second part, the right to cut and remove for his own use, during the term of fifteen years from the date hereof, all the timber, down and standing, alive and dead, during said period, excepting the pine which has been sold to Charles F. Button, now on the following described lands situated in the county of Ontonagon and State of Michigan, to wit: [Here follow descriptions of all the lands contained in the answer and cross-bill of said intervening defendants.]

"To have and to hold the same for the period aforesaid to the use and benefit of the said party of the second part, his heirs, executors, administrators and assigns, and said party of the first part hereby covenants and agrees to and with the said party of the second part that it will warrant and defend the said timber unto the said party of the second part, his heirs, executors, administrators and assigns forever against the lawful claims and demands of all persons, except for public taxes for the period covered by this instrument, one-half of all of which are hereafter payable by the party of the second part, except the taxes for the year 1902.

"And the said 'Wilmot Mining Company' further, by these presents, licenses said party of the second part to enter and re-enter upon and pass over and across said premises as often as may be necessary during the aforesaid period, subject to the conditions of the sale of the pine timber thereon, made June 23, 1902, to Charles F. Button, for the purpose of cutting, hauling, removing and otherwise using said timber, and to make and maintain such logging roads as may be necessary for such purpose.

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But this license shall not justify any unnecessary injury to other timber, or authorize any fences, buildings or other structures that now are or hereafter may be put on said premises by said 'Wilmot Mining Company,' its agents or assigns, to be in any way injured or interfered with.

"Provided, however, and it is hereby expressly agreed, that time is of the essence of this contract, and these presents are upon the express conditions that said party of the second part shall pay one-half of all taxes and assessments of every kind whatsoever which shall be imposed upon said premises, commencing with the year 1903, and continuing until the surrender by said second party of this license, except as to increased value of any description by reason of improvements made by said first party, and shall on or before the first day of March of such years deliver to said first party a proper official receipt for one-half of the taxes so levied, assessed or imposed on said premises, as well as said timber, for each of such years, and a failure to pay such taxes as aforesaid, and deliver the receipts as aforesaid shall, without any action taken in reference thereto, by or on behalf of said Wilmot Mining Company, its successors or assigns, be deemed to be a surrender by said licensee of all rights hereunder, whether at law or in equity, and a cancellation or abandonment thereof.

"It is further agreed that all timber covered by this license not removed from said premises during the life of this license shall be and remain the property of said Wilmot Mining Company, its successors and assigns, as fully and absolutely as if this instrument had never been executed.

"In witness whereof, the party of the first part has caused these presents to be signed by its president, and countersigned by its secretary, and its corporate seal to be hereunto affixed, this 9th day of September, A. D. nineteen hundred two," etc.

On November 3, 1902, Burns sold "all his rights and interests" in the timber given by the foregoing instrument to Dennis J. Norton, who, on December 3, 1902, sold the same to defendant Sullivan for a consideration of $8,800. On October 3, 1904, the Wilmot Mining Company, by warranty deed, sold all of said lands upon which the timber stood to appellant W. B. Blake, which deed contained the following reservation:

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"Excepting and reserving therefrom all the minerals underlying said herein described lands, and excepting and reserving all of the timber now on said described lands, with the right to enter upon said lands and employ all necessary means for the removing of said minerals herein reserved and removing said timber herein reserved."

On July 16, 1906, Blake conveyed to defendants Gates and Johnson an undivided three-fourths of all of said lands with the same reservation. Neither Burns nor any assignees claiming under him paid the taxes on these lands, as required by the terms of the license to him. On September 16, 1907, the Wilmot Mining Company executed a deed to Blake, Gates, and Johnson, which recited all of the transaction relative to this timber with Burns and the terms of the writing given him; the assignments from Burns to Norton, and from Norton to Sullivan; the former deed to Blake and his conveyance to Gates and Johnson; the fact that neither Burns nor any of the parties succeeding to his rights had paid the taxes on one-half of said lands and timber according to the terms of the writing under which they held, declaring and determining that the license had become forfeited and abandoned; and also reciting that the true intent of the parties when the former deed was given to Blake was to grant to him the lands, together with the timber, subject only to the rights of Button and Burns, under the agreements mentioned. Therefore the grantor conveyed to Blake, Gates, and Johnson in their proper proportions all of said timber, subject only to the rights of Button in the pine.

It was admitted that neither complainant nor any of the original defendants nor Burns or Norton had paid any of these taxes subsequent to the year 1903 (except taxes for 1907, upon a half of one section of land, was paid by complainant). Tax receipts were produced, showing that Blake had paid the taxes on an undivided half of said lands for the year 1904 and the same for the year 1905, except one 40 acres, on September 24, 1906, and it was admitted that these taxes were assessed against said lands for said years, and were returned unpaid and delinquent.

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Taxes for the years 1906 and 1907, which also had been paid by the intervening defendants, we think the record shows were paid to the auditor general after this suit was commenced and issue joined. Complainant's claim against defendant Sullivan was not disputed. The evidence of appellants was first introduced, and was entirely matters of record and in writing. Evidence was then introduced by complainant and the original defendants, by way of defense, to the answer and cross-bill of the intervening defendants, which will be noticed later. Then complainant and defendant Sullivan asked, and were allowed, subject to the objection of the intervening defendants, to amend their answers to the cross-bill of the intervening defendants, to allege and show the reasons and excuse of defendant Sullivan and complainant for failure to pay taxes in accordance with the contract, on account of Sullivan's lack of money, and that he had forgotten the requirements of the contract, and to allege that under the contract it was necessary for the Wilmot Mining Company to take some action declaring a forfeiture under the contract, and that they took none until September 27, 1907; that in the meantime all taxes had been paid; that as to taxes of 1907, the intervening defendants paid them before the time stipulated in the contract had expired, and thereby prevented Sullivan and complainant from paying them. They further denied that a forfeiture had occurred or been properly declared, and asked that, if the court should find that there had been such a forfeiture, they have relief therefrom upon paying all of the taxes, with interest, and any sum which the court may find equitable that should be paid by them by reason of expenses incurred, and for general relief. A decree of foreclosure was entered as to both the land and the timber against Sullivan. The interveners were denied relief, the decree providing that the taxes paid by them which Sullivan should have paid constituted a lien on the timber superior to the lien of complainant and others. The interveners have appealed.

The principal question in the case to be determined is, un-

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der the writing entered into between the Wilmot Mining Company and Burns, what interest, right, or title Burns acquired, and whether the effect of the default of Burns and his assignees to pay taxes as provided in the writing operated as a surrender of all rights thereunder and a termination of such interest. It is contended by complainant and defendant Sullivan that by this writing title to the timber passes, *in præsenti*, to Burns. A reading of this writing discloses that it is designated as a license, and the parties are called licensor and licensee, and the granting clause is a bargain and sale to Burns of "*the right to cut and remove* for his own use during the term of fifteen years from the date hereof all the timber, down and standing, alive and dead, during said period * * * now on the following lands," etc. The *habendum* clause reads, "To have and to hold *the same* for the period aforesaid to the use and benefit of said party of the second part," etc. The final paragraph of the writing provides:

"It is further agreed that all timber covered by this license not removed from said premises during the life of this license *shall be and remain* the property of said Wilmot Mining Company, its successors and assigns, as fully and absolutely as if this instrument had never been executed."

The character of an instrument is not to be determined by any particular language in any particular part of the instrument, but upon the consideration of the whole instrument and the purpose and object which is sought to be accomplished. The language of the whole instrument, fairly interpreted in connection with its purpose and object, must always be the foundation of all interpretation and construction. The parties were dealing with reference to the timber remaining on 3,520 acres of land at a nominal price of $2 per acre, which indicates to any one having the slightest knowledge of the value of standing timber at that time, and as the record indicates, that these were cut and burned lands, with little value left either in land or timber, and were so dealt with by the parties. Our con-

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clusion is, in view of the clear and unmistakable language of this instrument, that we cannot hold that a present title to this timber passed to Burns. It was a license, for a valuable consideration, to cut and remove this timber, under certain expressed conditions, during the term limited.

Complainant, in his contention that a present title to the timber passed under this contract, relies upon *Hodges* v. *Buell*, 134 Mich. 162 (95 N. W. 1078), and *French* v. *Lumber Co.*, 135 Mich. 424 (97 N. W. 961). These cases, and the cases cited and quoted in them, and upon the authority of which they were decided, are all cases in which title to timber was conveyed in terms by deed or contract, with the limitation as to the time of removal, or cases in which land was sold reserving certain timber to be removed within a certain time, and are distinguishable from the case at bar, where a license was given "to cut and remove for his own use," during the period limited, "all of the timber, down and standing, alive and dead, * * * now on the following described lands." Our construction is that under this contract title passed only when the timber was "cut and removed." The cases relied upon could have no applicability to the construction of this license, except when a question arose as to whether the timber had been "cut and removed" within the term limited, a question not in this case. The parties contending in the present case are in exactly the situation of the original parties to the agreement. The intervening defendants have all the rights of the Wilmot Mining Company, and complainant and defendant Sullivan represent the rights and interests of Burns.

The paragraph of the contract containing the conditions referred to, which the licensee undertook and agreed to perform in order to insure his rights thereunder to cut and remove the timber during the time limited, on account of its importance and for the purposes of convenience, is here repeated:

"Provided, however, and it is hereby expressly agreed,

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that time is of the essence of this contract, and these presents are upon the express conditions that said party of the second part shall pay one-half of all taxes and assessments of every kind whatsoever which shall be imposed upon said premises, commencing with the year 1903 and continuing until the surrender by said second party of this license, except as to increased value of any description by reason of improvements made by said first party, and shall on or before the first day of March of such years deliver to said first party a proper official receipt for one-half of the taxes so levied, assessed or imposed on said premises, as well as said timber, for each of such years, and a failure to pay such taxes as aforesaid, and deliver the receipts as aforesaid shall, without any action taken in reference thereto, by or on behalf of said Wilmot Mining Company, its successors or assigns, be deemed to be a surrender by said licensee of all rights hereunder, whether at law or in equity, and a cancellation or abandonment thereof."

The record shows that taxes for the years 1904, 1905, and 1906 were not paid by defendant Sullivan or the complainant, as required by the above provision.

The appellants contend that the instrument was self-operating; that, although affirmative action was taken to declare the license canceled and terminated, it was not necessary, and that the relief asked by them is a declaration by the court of the effects which follow the default and forfeiture, and not an application to the court to declare or enforce a forfeiture.

Complainant, insisting that title passed, urges that this provision is a mere security and a condition subsequent, from the effect of a violation of which equity will not relieve where compensation in money is adequate, and that equity will never intervene affirmatively to enforce a penalty or forfeiture. If our construction of the contract were in accord with complainant's contention, the logical sequence would be to adopt the propositions last above stated, but we have passed his first position by the construction already given. The condition relative to taxes was a condition precedent. The license being a grant of

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privilege to be exercised upon the conditions agreed upon, the performance of which was necessary to protect the title of the grantor, then such license could be exercised only upon the performance of such conditions, and a neglect to perform the conditions was stipulated to be an abandonment of the license. The time for such performance of the conditions was made by the express terms of the contract essential. For three successive years the conditions to pay these taxes were not performed. By the terms of the contract, these defaults operated as an abandonment and surrender of the license and all rights thereunder. 1 Pomeroy on Equity Jurisprudence (3d Ed.), § 455; 2 Warvelle on Vendors (2d Ed.), § 807; *Detroit, etc., Plank Road Co.* v. *Railway Co.*, 103 Mich. 585 (61 N. W. 880). The same rule is applied in all cases where options are given on conditions to be performed within a certain time.

The theory of the intervening defendants' answer and cross-bill was that, by the agreement the licensee having defaulted, the license was forfeited, annulled, and canceled, and the prayer was that this be so declared by the court, and the license, complainant's mortgage, and the subsequent mortgages be declared clouds upon their title to said timber, etc. Complainant and defendant Sullivan, under amendments to that effect offered and allowed under objection at the close of the proofs, while insisting that no forfeiture had occurred, asked that, if the court should find that the nonperformance of the conditions of the license operated as a forfeiture of their rights, they might be relieved therefrom by such payment as the court might decree. Without deciding whether these amendments were timely or not, we are satisfied that the evidence furnished, as bearing upon the reasons why relief should be granted, shows that Sullivan's excuse was that he had forgotten the time payment should have been made, and that it would have been a matter of inconvenience for him to pay; that he asked the complainant to pay, and he said he would wait until after foreclosure. Sullivan always

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had knowledge of the conditions in the license, and complainant testified that, through an abstract furnished early in April, 1906, by Sullivan, he understood that one-half of the taxes should be paid by Sullivan. He filed his bill in April, 1907, and made no tender until about the 1st of October following. No meritorious case was made out warranting the court in granting such relief, if the case were one where the question could be properly considered. We think the question was not open to the parties, who from the beginning had insisted there was no forfeiture, and so insist in this court.

The supreme court of Massachusetts said:

"We have not considered the plaintiff's argument that there was no forfeiture of the lease. We are of opinion that, in a bill in equity to be relieved from a forfeiture at law [which is the position of complainant and Sullivan in this case under their cross-answers], it is not open to him to make the contention that there is no forfeiture at law." *Gordon* v. *Richardson*, 185 Mass. 492 (70 N. E. 1027, 69 L. R. A. 867).

So in the case at bar, the positions taken by complainant and defendant Sullivan were inconsistent. Upon both contentions we do not agree with them, as appears from our conclusions herein set forth. By nonperformance of the conditions of the license all rights under it had terminated, and the intervening defendants were entitled to have the court so declare. The court was in error in not so finding and in decreeing that the claims of defendant Sullivan and complainant and the other defendants were clouds upon their title to said timber, and granting the relief asked by them.

The decree of the circuit court is reversed, and a decree will be entered in accordance with this opinion, with costs of both courts to appellants.

GRANT, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

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SCHMIDT *v.* MICHIGAN COAL & MINING CO.

1. TRIAL—APPEAL AND ERROR—DIRECTING VERDICT—EVIDENCE OF NEGLIGENCE.

   In an action for injuries caused by defendant's alleged negligence, the court, in reviewing a judgment on a verdict directed for defendant, must give to the plaintiff's evidence the most favorable construction it will bear in his favor.

2. NEGLIGENCE—DUTY TO LICENSEES OR TRESPASSERS—INVITATION TO ENTER UPON PREMISES—QUESTIONS OF LAW AND FACT.

   Where a miner, injured in an explosion, had applied for work to defendant's pit boss, who told him to return on a subsequent day, when he again went and made application to defendant's superintendent who referred him to the pit boss, whom he then attempted to find on defendant's premises, it is a question of fact for the jury whether an express or implied invitation to be on the premises might not be inferred from the conversation.

3. SAME—DUTY TO TRESPASSERS OR LICENSEES—WORKMAN SEEKING EMPLOYMENT.

   After the owner of premises is aware of the presence of a trespasser or licensee, or if, in the exercise of ordinary care, he should know of his presence, it is his duty to use ordinary care to prevent injury to him arising from active negligence.

Error to Bay; Collins, J. Submitted October 19, 1909. (Docket No. 125.) Decided December 30, 1909.

Case by George Schmidt against the Michigan Coal & Mining Company for personal injuries. A judgment for defendant on a verdict directed by the court, is reviewed by plaintiff on writ of error. Reversed.

Elbert V. Ingersoll, for appellant.

Weadock & Duffy, for appellee.

MCALVAY, J. This suit was brought by plaintiff against defendant company to recover for personal injuries

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received by the explosion of a compressed air tank located in the tipple at defendant's mine, claimed to have been caused by the negligence of defendant's agents and representatives. Plaintiff is a miner, and went to defendant's mine on Saturday, July 7, 1906, seeking employment. He saw Joseph Watton, the pit boss, at the tipple, which is the building or construction over the mouth of a mine shaft supporting the cables which operate the cages up and down into the mine, and asked him for work. He was told that the old men had not yet all returned; that he did not know whether or not there would be a place for him; that the mine would start up on Monday following, and requested him to return at that time when he could tell him more about it. The pit boss had charge of the men in the mine, and it was the custom at the mines in Bay county for men seeking employment to see the pit boss as to whether there was employment to be had. Plaintiff returned on Monday following, arriving at the company's office about half past 3 in the afternoon. He asked the superintendent as to his prospect of getting work. He was told by him substantially the same as the pit boss, Mr. Watton, had told him on Saturday, and added, "I couldn't tell you unless some one has quit, then I could give you a place;" that he did not know how it was down below; that Mr. Watton was taking care of that. The superintendent and plaintiff were the only persons present and left the office at about the same time. Plaintiff went to the tipple for the purpose of seeing Watton, and seated himself on a keg near the shaft to wait for him as he came up at 4 o'clock. While he sat there the superintendent came in there near him. The engineer, the superintendent's son, and other employés of defendant were in and out the tipple, during which time three car loads of coal were hoisted out, and some bags of oats for the mules were let down into the mine. In the tipple there was an air tank or receiver, in which air for use in operating the cutting machines in the mine was compressed by an engine in the engine room,

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which was under the control and operation of the engineer. At about 4 o'clock an explosion at this air receiver apparatus occurred which tore out all its connections and threw it over. Plaintiff was struck by a piece of pipe, on his left arm, which was mangled, and the forearm torn off, and on account of these injuries his arm was amputated. The negligence alleged in the declaration, and which plaintiff claims was shown by the testimony, was the improper regulation of the safety valve on the compressed air tank; the failure of the engineer to shut off the compressed air apparatus 5 or 10 minutes before quitting time; and negligence of the engineer in leaving the engine room at quitting time and assisting in loading the oats. It appeared from the testimony that the machines in the mine, called cutting machines, which were run by compressed air, were usually stopped from 5 to 10 minutes before quitting time, and then the engineer would shut down the engine running the compressor.

At the close of plaintiff's case defendant moved that the court direct a verdict upon the grounds, among others, that plaintiff had shown no invitation, express or implied, to come upon these premises at this place, and was a trespasser or a mere licensee, and could not recover. The court granted the said motion upon these grounds, and a verdict was directed, and a judgment entered accordingly. These are the questions argued by counsel and discussed in the briefs before us. Plaintiff contends that the direction of this verdict was clearly against the evidence in the case, and that the action of the court was erroneous.

The court said in his decision upon the first ground:

"Now, upon the point upon which I charge you, there is not a dispute in the evidence. I take the evidence just as the plaintiff gives it, and under that evidence I am bound to say to you that, as a matter of law, the plaintiff is not entitled to recover."

The court further found that plaintiff was in the tipple

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as a licensee, on his own business and not on any business of the company, and therefore he could not recover.

Plaintiff is entitled to have the evidence presented by his case given the most favorable construction it will bear in his favor, where a verdict has been directed against him. We are not able to say that, as a matter of law, there was no evidence of an implied invitation to go to the tipple on the day of the accident to consult the pit boss. A custom was shown that the usual thing for miners to do, at the Bay county mines, when seeking employment, was to go to the pit boss. Plaintiff had sought him out and was requested to return on Monday. On that day he went to the office, and from the evidence related by him relative to his conversation with the superintendent, it appears that the pit boss was the one who furnished the information when men were needed in the mines. There was evidence to submit the question to the jury whether an express or implied invitation to go to the tipple and ascertain from the pit boss, might not be inferred from what the superintendent said. There is abundant authority to sustain the contention that where there is evidence, though contradicted, from which an invitation might be inferred, it is a question for the jury. *Pelton* v. *Schmidt*, 104 Mich. 345 (62 N. W. 552, 53 Am. St. Rep. 462); 21 Am. & Eng. Enc. Law (2d Ed.), p. 472; *Mallock* v. *Derby*, 190 Mass. 208 (76 N. E. 721); *Banderob* v. *Railway Co.*, 133 Wis. 249 (113 N. W. 738).

There is another question necessary to be considered. The court held that plaintiff was a licensee, and could not recover, as a matter of law. That question may be before the trial court again upon the new trial.

There was evidence in the case to go to the jury upon the question whether the superintendent knew that plaintiff was at the tipple. The superintendent testified that he was there at least once after plaintiff was at the office. Plaintiff also testified upon the question. The weight of authority would appear to be that after the owner of

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premises is aware of the presence of a trespasser or licensee, or if in the exercise of ordinary care he should know of their presence, he is bound to use ordinary care to prevent injury to them arising from active negligence. 21 Am. & Eng. Enc. Law (2d Ed.), p. 473, and cases cited; *Herrick* v. *Wixom*, 121 Mich. 384 (80 N. W. 117, 81 N. W. 333); *Brown* v. *Railroad*, 73 N. H. 568 (64 Atl. 194); 29 Cyc. p. 443. No evidence was offered by defendant. We are satisfied that, from this record as here presented, plaintiff was entitled to have the case submitted to the jury.

For the reasons stated, the judgment is reversed, and a new trial is granted.

GRANT, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

WALSH *v.* GIBSON.

1. EVIDENCE—REPUTATION—GOOD CHARACTER IMMATERIAL—TRESPASS FOR ASSAULT.

   In an action of trespass for an assault with intent to ravish, any error which may have been committed on the trial, in admitting evidence of the defendant's good character, is cured by subsequently striking out the testimony and charging the jury that it was withdrawn from their consideration.

2. SAME—PROVING REPUTATION BY SPECIFIC INSTANCES.

   Repeated questions, on cross-examination of the plaintiff, having a tendency to prove her evil reputation by specific instances of misconduct, were not reversible error, where the trial court excluded the evidence, and counsel for the plaintiff stated that he did not object to such evidence and had previously admitted similar testimony without objection.

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Error to Wayne; Mandell, J. Submitted October 22, 1909. (Docket No. 41.) Decided December 30, 1909.

Trespass *vi et armis* by Anna M. Walsh against Fred Gibson. A judgment for defendant is reviewed by plaintiff on writ of error. Affirmed.

A. G. Shepard (*George F. & Peter J. Monaghan*, of counsel), for appellant.

James H. Pound, for appellee.

MCALVAY, J. Plaintiff brought an action for damages for an assault with intent to ravish made upon her, claimed to have been committed at her home, in the city of Detroit, in the month of July, 1906. She was a married woman in good health and about 40 years of age, living with her husband in a house which he purchased upon a contract from defendant several years before. Payments had been made from time to time upon this contract to defendant, who was accustomed occasionally to call at the house for such payments, sometimes each month, or once in two months, previous to the year 1906, when the claimed assault occurred. Plaintiff offered proof tending to show: That defendant came to her house about the middle of June of that year, seized her by the neck, and pulled her upon his lap as he sat down in a chair, asking her repeatedly to kiss him, holding her with one hand on the back of her neck and the other on her right breast; that she escaped from him, went out upon the porch, and met a neighbor who was going by, and conversed with her about half an hour, saying nothing whatever about this incident; that during this conversation defendant came out of the house and requested her to tell Mr. Walsh he would call again on that business. Proof was also offered by her tending to show that on July 9th, about three weeks after the foregoing occurrence, defendant came to her house again, and into the room where she was, and after some preliminary statement that he had

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left her husband as his guest at St. Clair flats, and had promised to return that evening, he said that if she would go to his house that night he would not go back until morning. She claims she ordered him to leave the house; that he tried to explain, and after some conversation he suddenly closed the door between the room they were in and the dining room and committed the assault complained of; that the assault was violent; that her clothes were torn, and she was severely injured; that she screamed, and a woman who was washing for her came to her assistance, when defendant desisted.

Defendant is of the age of 49 years, and of less weight than plaintiff. He has been entirely deaf for 24 years, and during the trial testified through an interpreter. The evidence on his part denied plaintiff's claim that an assault was made upon her by him at any time. He testified that he was there on July 2d and saw Walsh and his wife; that his business was to collect interest. He was there next on July 9th, when plaintiff made a payment. She complained of being ill, and apparently fainted, and he caught her to prevent her falling. On his part evidence was admitted attacking the general reputation of plaintiff for chastity and morality as bearing upon the question of damages. The above is a very brief statement of the case, but is sufficient to indicate the issue made, in view of the errors assigned by plaintiff. The case was of considerable length. About 60 witnesses testified. The jury returned a verdict against plaintiff of no cause of action. A motion for a new trial was made and denied. A bill of exceptions was then settled and errors assigned.

Plaintiff's contentions before this court are:

(1) That it was reversible error for counsel to persist in asking questions regarding specific acts of claimed misconduct upon the part of plaintiff, after the court had excluded the questions and had warned counsel to desist.

(2) That the court erred in permitting evidence as to defendant's good character.

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In considering these errors assigned, we will reverse their order. It appears that the testimony admitted as to defendant's good character, as far as we are able to find from the record, was given by witness Malcomson, who testified that defendant's general reputation for virtue and chastity was good. This was objected to generally as incompetent. We find later that defendant was asked:

"*Q.* I will ask you if you have had any charge made against you or been arrested in your life? (Objected to.)
"*The Court:* I will admit it. Note an exception.
"*A.* I have not."

Counsel for plaintiff then said:

"I object to it. A question of that kind cannot be answered unless something was introduced on the other side of the proposition.
"*The Court:* Note an exception."

Later witness Dayman was asked relative to defendant's general reputation in that neighborhood. Plaintiff's counsel then stated fully the reasons for the objection. After such statement, from which it appears the court had already asked for the production of authorities, the court refused to allow witness to answer the question, and on motion of plaintiff's counsel struck out such testimony of former witnesses. In his charge the court said:

"I instruct you that previous good reputation of the defendant is no defense in this action, and testimony on that subject that was introduced, and was afterwards stricken out, is not to be taken into consideration by you in arriving at a verdict. Your verdict must be based on the evidence that is legitimately in the case, and on any logical inference that might be drawn therefrom, and upon nothing else."

The court in his final ruling upon the question and striking out this testimony at plaintiff's request, and in his charge to the jury, above quoted, removed any cause for complaint on the part of plaintiff.

The complaint made of the conduct of defendant's coun-

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sel as constituting reversible error in persistently asking questions regarding specific acts of misconduct on the part of plaintiff, after similar questions had been excluded by the court and counsel warned, is treated by both parties as the serious question in the case. The contention on the part of plaintiff is that this was an attempt to show plaintiff's general reputation by proving specific instances of misconduct on her part. The court so ruled and excluded all testimony so offered, sustaining plaintiff's objections. That counsel for defendant was persistent and repeatedly asked questions of the same character is amply shown by the record, and he was warned and cautioned by the court for so doing. Plaintiff's counsel rely upon the following cases as supporting their contention: *Proctor* v. *Hough-taling*, 37 Mich. 41; *McGee* v. *Baumgartner*, 121 Mich. 287 (80 N. W. 21). A reading of all this testimony shows that, in several of the instances complained of, defendant was, by showing where plaintiff had been and what she had done, undertaking to contradict plaintiff's claim that she was seriously injured and disabled, and, when the court and defendant's counsel finally came to an understanding, no further difficulty occurred. Whether the rule laid down in the cases relied upon by plaintiff is applicable to cases of the kind now under consideration, is not necessary to discuss. Early in this trial, which was a long one, counsel for plaintiff in effect invited and challenged defendant's counsel to the line of investigation now so strenuously objected to. On cross-examination of plaintiff she was asked relative to a certain suit brought against her and her husband in Clinton county. This was excluded on the objection of plaintiff's counsel, who, during the discussion, in claiming that it was immaterial and irrelevant, said:

"We are not prepared to go into it; but anything connected with this woman, on occasions of this kind, we do not object to, and we give them ample opportunity to bring anything."

Afterwards evidence relative to specific instances of

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misconduct of plaintiff was introduced by defendant without objection, which, if true and believed by the jury, warranted the inference that she was a person of tainted character. This continued on cross-examination throughout plaintiff's case and on examination of some of defendant's witnesses before objection was made. Then, after the jury had been dismissed, defendant's counsel made an extended statement as to what he proposed to show, which included many specific instances of questionable conduct on the part of plaintiff. On the return of the jury the case proceeded. All objections of plaintiff were sustained by the court. The court, at the time of excluding this class of evidence, after objection was made, and in his charge, did all he could to protect the rights of plaintiff. We do not think plaintiff should be allowed to complain of this class of evidence under the circumstances. Evidence of the character of that complained of was in the case without objection, and the right to object had been waived.

The court, upon denying the motion for a new trial, considered both of the points now raised before this court, upon their merits, and held that in his opinion the error committed in allowing good reputation of defendant to be shown was cured by the charge, and that, in view of the instructions given in the charge to the jury and cautions given at the time, the conduct of defendant's counsel did not constitute reversible error.

"The theory upon which defendant resisted the suit was that the charge was a sheer fabrication by the plaintiff and her husband to extort money."

The above quotation is applicable to the case at bar. We think that the conclusion upon the facts, submitted by the court in his charge, and as found by the jury, was a correct one, and we quote further from the words of Mr. Justice GRAVES in the same case:

"The general inquiry is whether any mistakes so far serious were committed as to render it necessary to dis-

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turb the result." *Mawich* v. *Elsey*, 47 Mich. 10, at page 12 (8 N. W. 587, 10 N. W. 57).

We find no reversible error in the case.

The judgment is affirmed.

GRANT, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

AUDITOR GENERAL *v.* McCALL.

1. JUDGMENTS—RES ADJUDICATA—DRAINS—TAXATION.
   A decree in equity determining the validity of a drain tax is *res adjudicata* in subsequent proceedings for the sale of the land for unpaid taxes, when the same ground of objection to its validity was set up by the owner in his pleading in the prior suit.

2. SAME—CONCLUSIVENESS AS TO DEFENSES.
   A party is concluded by a judgment determining the validity of a tax with respect to all reasons which he might have urged against it.

Appeal from Eaton; Smith J. Submitted October 22, 1909. (Docket No. 149.) Decided December 30, 1909.

Petition by Oramel B. Fuller, auditor general, against Lyman H. McCall for the sale of certain land delinquent for taxes. From a decree dismissing the petition, petitioner appeals. Reversed, and decree entered for petitioner.

Russell R. McPeek, for petitioner.

Garry C. Fox and *Lyman H. McCall*, for defendant.

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MONTGOMERY, J. The petition of the auditor general for a decree ordering the sale of lands for delinquent taxes, filed in February, 1909, included a prayer for a sale of the lands of the defendant for delinquent drain taxes amounting to $427.20. The defendant, the owner of these lands, objected to the tax on the ground that the notice of letting the contracts for the construction of the drain was insufficient, as 10 days had not elapsed before the last date of publication of notice of letting the contracts, and as proof of such publication was not before the drain commissioner on the date of letting. It appears that the defendant appeared before the drain commissioner on the date of letting, and objected to the proceedings. Subsequently a bill was filed by defendant and another to restrain the completion of the drain. Among the grounds set up as sustaining the complainant's claim was the following:

"They say that they nor neither of them was served with any notice whatever of the time when and the place where said jobs were to be let, nor the time when or the place where the assessments of benefits for the alleged completion of said drain were to be reviewed. But having learned of such attempt on the part of the commissioner, your orator, Samuel Pollock, appeared before said commissioner by his solicitor, Garry C. Fox, your orator, Lyman H. McCall, appearing in person."

The different methods of service are pointed out by the statute. Where the party resides in the township, personal service of notice is required, and, as to nonresidents, a published notice is required. It is very clear that this averment in the bill negatived any legal service of notice whatever. That case was tried through to a conclusion, and a decree rendered dismissing the bill. It is now contended that this determination is *res adjudicata*, and that defendant is not in a position to again raise the questions presented by that bill of complaint. We think this contention should prevail. Not only is it the rule that a party may not split his cause of action, and should include

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in his suit all the reasons which he has to urge against the validity of a tax when he assails it (*Sayers* v. *Auditor General*, 124 Mich. 260 [82 N. W. 1045]), but we find that this precise objection was, under proper averment of the bill, made a ground of complaint, namely, the want of notice. As before stated, the averment that no notice whatever was served was as to the nonresident complainant in that suit, the defendant in this, a sufficient averment that proper notice had not been given by publication. It averred the very matter which is now asserted as a defense here. It must be held that the defendant has had his day in court, and that he cannot now relitigate that question.

The circuit judge, while expressing doubt as to his conclusions, held this tax void. That decree will be reversed, and a decree entered here for the amount of the tax, and the case remanded for further proceedings.

GRANT, OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

LONG *v.* VILLAGE OF DUNDEE.

1. TAXATION—SPECIAL ASSESSMENTS — MUNICIPAL CORPORATIONS.
   In an equitable action for money had and received, brought against a village to recover the amount of a special paving tax paid under protest, the plaintiff can only recover the excess above the amount properly assessed against his property.

2. SAME—SPECIAL ASSESSMENTS—PAVING TAX—IRREGULARITY.
   A suit will not lie to recover taxes paid when the only complaint that can be made is that the proceedings in their levy and collection have been irregular, the remedies by review or appeal being adequate to afford redress.

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3. SAME—PAVING TAX—VALIDITY OF EXCESSIVE LEVY.
Under a statute limiting the amount of a tax to five per cent. of the valuation of any parcel assessed, and under proceedings which authorized the collection of one-fifth of the entire special tax for paving the first year, an installment of $18 is payable on the first assessment by an owner of premises assessed at a valuation of $1,800, who cannot, however, recover, where a tender had been made of the excess collected.

4. SAME—ACTIONS TO RECOVER TAXES PAID—PARTIES.
The portion of an excessive levy for a village paving tax, consisting of the fees and expense of making a levy by the tax collector, is not recoverable from the village in the absence of evidence that such amount was reported to the village or became a part of the public fund.

Error to Monroe; Golden, J. Submitted October 22, 1909. (Docket No. 153.) Decided December 30, 1909.

Assumpsit by Cornelius F. E. Long against the village of Dundee for money had and received. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

George M. Landon, for appellant.

Willis Baldwin, for appellee.

MONTGOMERY, J. This action was brought to recover a special assessment imposed upon property of the plaintiff for the purpose of paying in part for paving the street in front of his premises, which assessment was paid under protest. The defendant village is organized under the general statute, 1 Comp. Laws, chap. 87. In the year 1907, the common council directed the making of a special assessment roll to meet 75 per cent. of the cost of paving the district, and directed the assessment to be made according to benefits; also, that the amount assessed against each parcel should be divided into five equal parts, one part to be collected in the year 1907, one part to be collected annually thereafter, until the whole was collected,

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with interest on such deferred parts, at 6 per cent. per annum. The council further directed that "the valuation of each parcel of land fronting upon said improvement, as fixed by the last assessment roll, the per cent. of benefits received by each parcel, and the amount of money to be collected on account of such parcel, this fiscal year" be placed upon said roll, and that the entire assessment against any particular parcel should not exceed 25 per cent. of such assessed valuation. The board of assessors were required to report such roll to the council and file the same with the village clerk on or before July 13th. The roll contained the description of the plaintiff's premises, and the valuation of $1,800 and per cent. of benefit was given. The total amount of tax was given at $110, and the amount assessed against the premises for 1907, $22. The assessment roll was made, reported, and filed, and afterwards reviewed and confirmed by the council, after notice.

In August, 1907, the council ordered the clerk of the village to make and annex to a certified copy of the roll a warrant for the collection of the several amounts named in the said roll for the year 1907. A warrant was thereupon prepared directing the collection of the amount in the column marked, "Amounts assessed against premises, 1907." The treasurer, with such roll and warrant, called upon the plaintiff and made demand for payment. The plaintiff offered to pay the treasurer the sum of $90, claiming that this sum was 5 per cent. of the valuation of the premises and all that could be lawfully assessed. The treasurer, not being satisfied of his right to accept the money, sought advice, and on his return refused to accept the money, and demanded the sum of $22, which he was ordered to collect. This sum, with costs, appellant then paid under protest. Claim for the return of this money was made and filed with the council, which the council neglected to allow or reject. Before the actual commencement of this suit, however, the village tendered to the appellant the sum of $6.40 in satisfaction of his

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claim. On the trial a verdict was directed for the defendant, and plaintiff brings error.

The theory of the plaintiff is: That the village treasurer should have been authorized by the warrant to collect the total amount of the assessment for the full five years, which, according to his theory, would be $90; that the assessment for the year 1907 of $22 was excessive, as the limit authorized was $18; that the total assessment of $110 exceeds the 5 per cent. authorized by the village charter; and that the council had no authority to direct the issuance of a warrant to collect one-fifth of the amount.

The case presented shows that the tax was properly authorized to be spread; but that as assessed it contained an excess over the amount authorized by the statute. This is an equitable action for money had and received. There is no reason for saying that the plaintiff should recover the amount properly assessed against his property which was included in the assessment. The irregularity in imposing a larger tax than was authorized did not excuse the plaintiff from the legal or moral obligation to meet the tax which was in fact assessable and properly spread. This is not an action against the treasurer for trespass, but is brought against the municipality to recover money which it ought not in equity to receive.

"A suit will not lie to recover back taxes paid, when the only complaint that can be made of them is that the proceedings in their levy and collection have been irregular. The fact of irregularity does not establish injustice; there must be something further in the case which either exempts the party from the tax altogether, or which, because of illegality or inequality, deprived the officers of jurisdiction. * * * Irregular action does not necessarily injure the parties concerned; and, where it does, the remedies given by review or appeal are supposed to afford full redress. * * *" Cooley on Taxation (2d Ed.), p. 808.

See, also, *Gratwick, etc., Lumber Co.* v. *Village of Oscoda*, 97 Mich. 221 (56 N. W. 600); *Minor Lumber Co.* v. *City of Alpena*, 97 Mich. 499 (56 N. W. 926);

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Godkin v. *Township of Doyle*, 143 Mich. 236 (106 N. W. 882).

In the present case the village was entitled to collect and receive from the plaintiff $18. It received $22; $6.40 was tendered back before suit was brought. Under section 2845, 1 Comp. Laws, the proceeds of a sale for the collection of taxes are to be applied to the payment of the assessment and a percentage of 5 *per centum* upon the amount of the assessments for costs and expenses of seizure and sale. This is all the money that, under the statute, finds its way into the hands of the treasurer of the village. There is no evidence that the other costs and expenses were reported to the village or became a part of the public fund. If the plaintiff is entitled to recover in any action these items, it would be in an action against the collector, rather than the village. See *Godkin* v. *Township of Doyle*, *supra*.

The plaintiff has not been compelled to pay an excess over the amount properly assessable and collectible from him, and is not entitled to maintain this action.

The judgment is affirmed.

GRANT, OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

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SMITH v. BARRETT.

EASEMENTS—DRAINS—HIGHWAYS—WATERS AND WATERCOURSES.

A bill in equity will not lie to enjoin the township highway commissioner from enlarging a drain under the highway which, for more than fifteen years previous, had obstructed a portion of the natural flow of water upon complainant's premises from the upper proprietors' land, and no prescriptive right could be gained as against the public to restrict the amount of water which would otherwise naturally descend upon the servient estate.[1]

Appeal from Eaton; Smith, J. Submitted November 9, 1909. (Docket No. 12.) Decided December 30, 1909.

Bill by John W. Smith against Orris L. Barrett, highway commissioner of the township of Eaton Rapids, to enjoin the enlargement of a drain. From a decree dismissing the bill, complainant appeals. Affirmed.

Garry C. Fox, for complainant.

Joseph B. Hendee (*Huggett & McPeek*, of counsel), for defendant.

OSTRANDER, J. A highway runs east and west north of complainant's land. From the northeast corner of the land an intersecting highway runs north. There is also a highway on the west side of the land. Some of complainant's land is low—he owns 120 acres—and in its vicinity are other low lands. To the west of it are drains; one of them, at least, being a county drain. With one of them is connected a drain or ditch some 200 rods in length, which was dug by complainant, and which extends east

[1] As to rights as to flow of surface water, see note to *Gray* v. *McWilliams* (Cal.), 21 L. R. A. 593.

As to rights acquired in an artificial condition of a body of water, see note to *Pewaukee* v. *Savoy* (Wis.), 50 L. R. A. 836.

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and west across his land. Into this ditch is discharged water which flows from lands to the north and the north and east of complainant's land, which comes to his land in a ditch or drain in the said north and south highway on the west side thereof. This highway ditch or drain crosses the highway at some distance north of complainant's land, and extends thence north and east. It is more accurate to say that the highway was constructed over and across a ravine which was a natural creek and drain, the waters of which originally flowed to and upon the land of complainant. At the point at which the highway was built over the ravine there existed, in the year 1880 and thereafter, a 15-inch tile, passing under the roadbed and about 34 feet in length. The tile replaced a log culvert. It was lowered in 1884, taken up and cleaned in 1888 and in 1904. When the water was high, the capacity of the tile was exceeded. The highway roadbed acted as a dam, and not only set back water upon upper proprietors, but was injured by the wash and percolating of the flood waters. In 1906 a sum of money was voted by the township to defray the expense of constructing a 4-foot concrete conduit 34 feet long in place of the 15-inch tile. While engaged in some work preliminary to its construction the highway commissioner was restrained by a temporary injunction issued upon the application of complainant, who filed his bill of complaint to restrain said commissioner and his successors—

"From opening or removing in any manner or to any extent the said fifteen-inch tile culvert so constructed, and being through and across the said north and south highway at a point about eighteen rods north of the north line of said east and west highway, running between sections five and eight of said township, said north and south highway being upon the quarter line of section five thereof; or from taking up or removing said fifteen-inch tile culvert or from constructing in the place of said fifteen-inch tile culvert any other or different culvert of a larger size or capacity than the said fifteen-inch culvert which your orator says was constructed through and across said

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highway upwards of eighteen years ago; or from in any manner digging or constructing any culvert at any other place along said highway so as to carry the water so accumulating upon the land of the said Daniel J. Young across said highway or upon the land of your orator in any greater quantities than the same can be carried by said fifteen-inch tile culvert now being through and across the said north and south highway hereinbefore described, and that your orator may have such further and other relief in the premises as the nature of this case shall require, and to this court shall seem just."

Upon the final hearing the court dissolved the injunction and dismissed the bill.

The bill charges a conspiracy between defendant and an upper proprietor to work an injury to complainant by flooding his land. It is conceded that the evidence does not sustain the charge. Beyond this it is the contention of complainant that, while the water carried by the tile and drain may continue as at present to flow upon his land, if the tile is removed and the concrete conduit constructed, the water, in times of flood, will be discharged in shorter time and in larger quantities, beyond the capacity of his ditch, and to his great damage. He asserts that little by little the flow of water in the tile and ditch has been increased by lateral drains and by changing the surface of the land by cultivation and otherwise; that in times of flood the barrier which the highway presents sets back the water to the east and northeast of the tile so that it covers six or more acres of land, and is five or six feet deep in the highway; that the said roadbed and the limited capacity of the tile has been a protection to his land for so many years that he is entitled to have existing conditions continued until a change can be made which will result in no damage to him. It is claimed that an adequate outlet to complainant's ditch to the west should be provided as one safeguard; the testimony, some of it, tending to prove that the outlet was not, at the time this suit was begun, adequate.

We are satisfied by an examination of the testimony

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that if the highway is to be properly protected, a larger opening through and under the traveled way is required. We are also satisfied that the failure of the tile to carry the water has been due in part to the fact that the flow was impeded, in the tile, by accumulation of material carried into the tile by the water, its size and situation preventing removal of such material. We are not satisfied that if the flow of water through the tile was unobstructed it would be a sufficient conduit in times of high water. The natural course of all water naturally finding its way into the ravine and watercourse is to complainant's land. It is not the case of an attempt to divert by artificial means and cast upon land water which would otherwise flow in another direction to other land. It is the case of the removal of an artificial impediment to the natural flow of water in a natural watercourse. The township authorities are not asserting a prescriptive right to cast upon complainant's land so much water as the 15-inch tile will carry. As to the natural flow of the water, the complainant's estate was originally the servient estate, and it is now none the less the servient estate, because public authorities have for some time impeded the natural flow by an insufficient artificial conduit. The highway and the tile drain may have protected complainant's land, in a measure, from the flow of water which would otherwise have come upon the land. At least it appears to have prevented its arrival at his land, in times of flood, in the volume and the time in which an open watercourse would have delivered it there.

It is possible that the public has gained, by prescription, the right to set the water back upon lands of the upper proprietors. The point is not involved. But even if the public had such a right, counsel refers to no rule, and we know of none, which secures complainant as against the public authorities charged with the duty of maintaining the highway the right, by prescription, to have the natural watercourse forever obstructed as it has been. There is the further consideration that the flow of water through the

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tile has of necessity been variable, depending upon the quantity and character of the obstructing material carried into the tile. We do not consider whether complainant may have the right to complain, in a proper action, of the conduct of upper proprietors in turning water into the natural watercourse by artificial means. We are satisfied that he may not prevent the defendant and his successors preserving the highway by removing the artificial impediment to the natural flow of the water.

The decree is affirmed, with costs to defendant.

BLAIR, C. J., and MONTGOMERY, HOOKER, and BROOKE, JJ., concurred.

CITY OF ALPENA, *for use of* BESSER, *v.* TITLE GUARANTY & SURETY CO.

1. MUNICIPAL CORPORATIONS — PUBLIC BUILDINGS AND WORKS — CONSTRUCTION BONDS.

   The surety upon a bond given to secure laborers and materialmen in the construction of public works (3 Comp. Laws, § 10743), is not liable for labor and materials provided for the benefit of the contractor in repairing his pumps and machinery.

2. SAME—BOND FOR CONSTRUCTION OF PUBLIC WORKS.

   A city which procures a bond from contractors who construct public buildings or works, running in terms to the city for the benefit of materialmen, etc., as obligee, instead of to the people as provided by statute, may bring action on the instrument for the benefit of persons who were intended to receive protection.

Error to Alpena; Emerick, J. Submitted November 9, 1909. (Docket No. 8.) Decided December 30, 1909.

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Assumpsit by the city of Alpena, for the use and benefit of Herman Besser, against the Title Guaranty & Surety Company upon a statutory bond. A judgment for plaintiff, on a verdict directed by the court, is reviewed by defendant on writ of error. Reversed, and no new trial ordered.

Luman W. Goodenough, for appellant.

O'Brien & Francis, for appellee.

BROOKE, J. On May 15, 1905, the Murray Company entered into a contract with the city of Alpena, by which the said Murray Company agreed to construct for said city a submerged crib, influent, conduit, and pump well, in connection with the waterworks belonging to said city. Plaintiff's declaration avers that:

"To secure the payment of all labor performed and material furnished in the building and constructing of * * * according to the provisions of sections 10743, 10744, 10745, 3 Comp. Laws, the said Murray Company executed and filed with the recorder of the city of Alpena, this plaintiff, a bond, * * * [the defendant herein being surety thereon]. That the said Murray Company became and was indebted to the said Herman Besser for work and labor performed and material furnished by him, the said Herman Besser, for said Murray Company, in erecting, building, and constructing the said submerged crib, influent, conduit, and pump well, in the sum of, to wit, $300," etc.

Under this declaration the use plaintiff, Herman Besser, testified that the Besser Manufacturing Company, of which he was president, had furnished labor and material to the Murray Company to the amount of $298.97; that such labor and material were furnished in repair work; that it went into the dredge, pumps, and machinery used by the Murray Company in connection with the work; that he was unable to say that any of the labor or material went into the work itself. No testimony was offered on behalf of defendant, and a verdict was directed in favor of plaintiff for the amount claimed.

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Three reasons are urged by appellant why a recovery should not have been permitted:

(1) That no recovery could be had upon the bond in suit, for the reason that it did not in terms comply with the language of section 10743, *supra*.

(2) That the trial judge erred in permitting an amendment to the declaration upon the trial by allowing the name of the Besser Manufacturing Company to be substituted in place of that of Herman Besser, as use plaintiff.

(3) That the work done and materials furnished by the use plaintiff were not furnished as a component part of the water system, or any of its parts, but upon repairs of machinery used upon the contract.

The first point was decided adversely to appellant's contention in the case of *City of Alpena, for use of Zess*, v. *Surety Co.*, 158 Mich. 678 (123 N. W. 536), where it was held that, construing the bond and contract together, the bond was a subsisting obligation to pay for "the labor and material required," within the meaning of section 10743, *supra*.

The second point involved we do not discuss.

With reference to the third point raised, it becomes necessary to determine for whose benefit the statutory bond is required, and whether the use plaintiff is among those entitled to its protection.

Section 10743, *supra*, is as follows:

"That when public buildings, or other public works or improvements are about to be built, repaired or ornamented, under contract, at the expense of this State, or of any county, city, village, township or school district thereof, it shall be the duty of the board of officers, or agents, contracting on behalf of the State, county, city, village, township or school district, to require sufficient security by bond, for the payment by the contractor, and all subcontractors, for all labor performed, or materials furnished in the erection, repairing or ornamenting of such building, works or improvements."

The provision of the bond upon which the claim of the use plaintiff is based is the promise of the defendant to save harmless the city of Alpena, etc., from unpaid claims

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for "labor and materials furnished under the contract." To give to this provision the construction claimed for it by the plaintiff would render the surety liable, not only for the cost of small and incidental repairs to the machinery and plant used in construction (which is the extent of the use plaintiff's claim in the case at bar), but also for all large changes and improvements in equipment, more or less permanent in character, and perhaps long surviving in usefulness the completion of the contract upon which the equipment was being used at the time the repairs were made. And by a parity of reasoning it might even be said that the surety became responsible for the original cost of the plant, because it was purchased by the contractor to be used upon the contract. We are of opinion that this contention is not tenable, but, on the contrary, think that the term "labor and materials, furnished under the contract," means such labor and materials as are necessary to construct the work in accordance with the contract. This view is supported by reason and authority.

The statute of the United States (28 U. S. Stat. 278 [U. S. Comp. Stat. 1901, p. 2523]) provides that the contractor's bond shall contain the obligation that the contractor "shall promptly make payments to all persons supplying him or them, labor and materials in the prosecution of the work, provided for in such contract." This language is broader than that of the Michigan statute under consideration. The obligation of the surety thereunder was defined in the case of *United States, for use of Standard Oil Co.*, v. *Security Co.*, 21 App. Cas. (D. C.) 369, where the court said in considering liability to the use plaintiff for oil used by the contractor upon machinery employed upon the contract:

"Was the oil supplied in the prosecution of the work within the meaning of the act of congress? The dredge itself, though costing more, perhaps, than the gross price of the contract, and capable of use in other similar works, public and private, would come under the class of things

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furnished to enable the contractor to fulfill his contract, for the contract could not apparently be performed without it. The same may be said of the various tools used by the laborers of a contractor in the construction of a public work. These are necessary to accomplish the work, and yet are commonly excluded from the lien of all statutes of the same general nature, where the security is limited to labor and materials only."

In the case of *United States, for use of Briscoe*, v. *Surety Co.*, 23 App. Cas. (D. C.) 155, which involved the right to recover for repairs to a dredge used upon the contract, it was held:

"We regard the question as too plain to require any elaboration of argument. As well might the person who constructed the dredging machine in the first instance seek to hold the surety liable, as the person who afterwards makes repairs in order to constitute the machine what it ought to be."

To the same effect are the cases of *United States, for use of Sica*, v. *Kimpland*, 93 Fed. 403; *United States, for use of Chapman*, v. *Surety Co.*, 23 App. Cas. (D. C.) 153; *City of Philadelphia, for use of Taylor*, v. *Malone*, 214 Pa. 90 (63 Atl. 539); *Beals* v. *Deposit Co.*, 76 App. Div. 526 (78 N. Y. Supp. 584).

We are of opinion that by the statute in question the legislature intended to afford to those who furnish labor or material for public buildings or works the same protection they would have under the general lien laws of the State, had the labor or materials been furnished for a private undertaking. If we are correct in this view, we are left in no doubt as to the construction the statute should receive. In *Smalley* v. *Gearing*, 121 Mich. 190, 203 (79 N. W. 1114, 1120), this court said:

"The equity of a lien claim for labor or materials arises from the fact that the value of the property to which they have been applied has been increased."

This case was cited and approved in *North* v. *Fence Co.*, 144 Mich. 557 (108 N. W. 285). See, also, *Luttrell*

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& Co. v. *Railroad Co.* (Tenn.), 105 S. W. 565; *McCormick* v. *Water Co.*, 40 Cal. 185. A very cogent reason for not extending the protection of the bond to that class to which the use plaintiff herein belongs is that to do so would tend to impair, if not absolutely destroy, the value of the bond to those who, in fact, did perform labor or furnish materials "in the erection, repairing, or ornamenting of such building, works, or improvements."

The judgment is reversed, and, as there is no dispute as to the facts, there will be no new trial.

BLAIR, C. J., and MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

CITY OF ALPENA, *for use of* O'BRIEN, *v.* TITLE GUARANTY & SURETY CO.

MUNICIPAL CORPORATIONS—PUBLIC BUILDINGS AND WORKS—STATUTORY BOND.

Labor performed for a contractor engaged in the construction of a public work, and consisting of time spent in raising a sunken dredge, is in the nature of a repair to machinery of the contractor, and is not secured by the statutory bond under 3 Comp. Laws, § 10743.

Error to Alpena; Emerick, J. Submitted November 9, 1909. (Docket No. 9.) Decided December 30, 1909.

Assumpsit by the city of Alpena, for the use and benefit of Michael O'Brien, against the Title Guaranty & Surety Company upon a statutory bond. A judgment for plaintiff on a verdict directed by the court is reviewed by defendant on writ of error. Reversed.

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Luman W. Goodenough, for appellant.

O'Brien & Francis, for appellee.

BROOKE, J. This case grows out of the controversy discussed in the case of the *City of Alpena, for use of Besser*, v. *Surety Co., ante*, 329 (123 N. W. 1126). The determination in that case is controlling of the case at bar, so far as it is applicable to the facts now before us.

The use plaintiff herein is assignee of nine different claims against the Murray Company for labor performed upon the dredge used by that company in the prosecution of the work under its contract with the city of Alpena. A portion of the time of each of the assignors for which pay is claimed was spent in raising the dredge, so that the work upon the contract could be continued. We are of opinion that to the extent this claim is based upon labor furnished in raising the dredge recovery must be denied. That labor must be considered in the nature of a repair. For the labor performed in operating the dredge while it was employed upon the contract the use plaintiff is entitled to a judgment.

Judgment reversed, and a new trial ordered.

BLAIR, C. J., and MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

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CITY OF ALPENA, *for use of* BEAUDRIE, *v.* MURRAY CO.

MUNICIPAL CORPORATIONS—PUBLIC BUILDINGS AND WORKS—BOND FOR CONSTRUCTION.

A recovery may not be had upon the statutory bond given by a contractor engaging in the construction of public buildings and works, for the value of cartage of supplies to and from a dredge which was used in the performance of the contract.

Error to Alpena; Emerick, J. Submitted November 9, 1909. (Docket No. 10.) Decided December 30, 1909.

Assumpsit by the city of Alpena, for the use and benefit of Thomas Beaudrie, Eugene H. Furbush, and others, against the Murray Company, principal, and the Title Guaranty & Surety Company, surety, upon a statutory bond. A judgment for plaintiff on a verdict directed by the court is reviewed by defendant surety company on writ of error. Reversed, and new trial ordered except as to use plaintiff Furbush.

Luman W. Goodenough, for appellant.

O'Brien & Francis, for appellees.

BROOKE, J. This is a companion case to that of the *City of Alpena, for use of O'Brien*, v. *Surety Co.*, *ante*, 334 (123 N. W. 1126), and is controlled thereby, except as to the claim of Eugene H. Furbush, which was for cartage of lumber, coal, machinery, and other supplies to and from the dredge used by the Murray Company in the prosecution of its work under the contract. This use plaintiff is not entitled to the protection of the bond under our determination in the case of the *City of Alpena, for*

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use of Besser, v. *Surety Co.*, *ante*, 329 (123 N. W. 1126). See cases there cited.

Judgment reversed, and a new trial ordered as to all use plaintiffs except Furbush.

BLAIR, C. J., and MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

NISBETT *v.* MILNER.

1. REFORMATION OF INSTRUMENTS — EQUITY — MISTAKE — CLOUD ON TITLE — TAXATION.

   On a bill to redeem from tax deeds held by a defendant to whom the land owned by complainants had been conveyed through a mistake of a prior grantor in complainant's chain of title, the equitable right to reform the deed is enforceable in favor of the complainants who made no claim through the erroneous instrument, but obtained title through a mortgage foreclosure and mesne conveyances from the grantor who committed the error.

2. SAME — JURISDICTION OF EQUITY.

   Equity having acquired jurisdiction on one ground will retain it for the purpose of giving such relief as will dispose of the controversy.

3. SAME — DEFENSES.

   Reformation is not barred by the defense that the complainants are not in a position to rectify the error by conveying the land which the deed should have conveyed, where the mistake had been in effect corrected, by a subsequent conveyance to the grantee in such deed, of the property which the parties intended to convey.

4. SAME — REMOVAL OF CLOUD — BILL TO QUIET TITLE.

   While a complainant in a bill to remove a cloud from the title of occupied lands must show that he is in possession or the

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defendant is not, such want of possession does not preclude relief in a case coming under another recognized rule of equity jurisdiction.

5. SAME.

The jurisdiction of equity, exclusive of any statutory provisions on the subject, to set aside deeds and other legal instruments which are a cloud upon the title to real estate and to order them to be delivered up, is fully established.

Appeal from Mecosta; Perkins, J., presiding. Submitted November 10, 1909. (Docket No. 139.) Decided December 30, 1909.

Bill by William P. Nisbett and another against George W. Milner and others to redeem from a sale of land for taxes, and to quiet title. From a decree for defendants, complainants appeal. Reversed, and decree entered for complainants.

Cogger & Broomfield, for complainants.

Smedley, Hall & Freeland, for defendants.

The bill of complaint in this cause was filed to establish and enforce the right of complainants to redeem, from a certain tax deed, dated September 5, 1901, given by the auditor general, to defendant George W. Milner. The property directly involved is a strip of land 20 feet north and south, and 100 feet east and west, out of the southeast corner of lot 14, block 20, of the original plat of the city of Big Rapids. This land, together with other lands, was purchased by complainants of M. Servetus Dart by warranty deed, dated October 30, 1900, for $20,100. The bill likewise (in effect) prays for the removal of certain clouds upon the title to said strip, occasioned by—

(1) The recording of a deed on February 13, 1896, dated December 22, 1891, from Daniel F. Comstock and wife to Chester W. Comstock and wife.

(2) The recording of a mortgage dated and recorded December 21, 1896, from Chester W. Comstock and wife to George Young.

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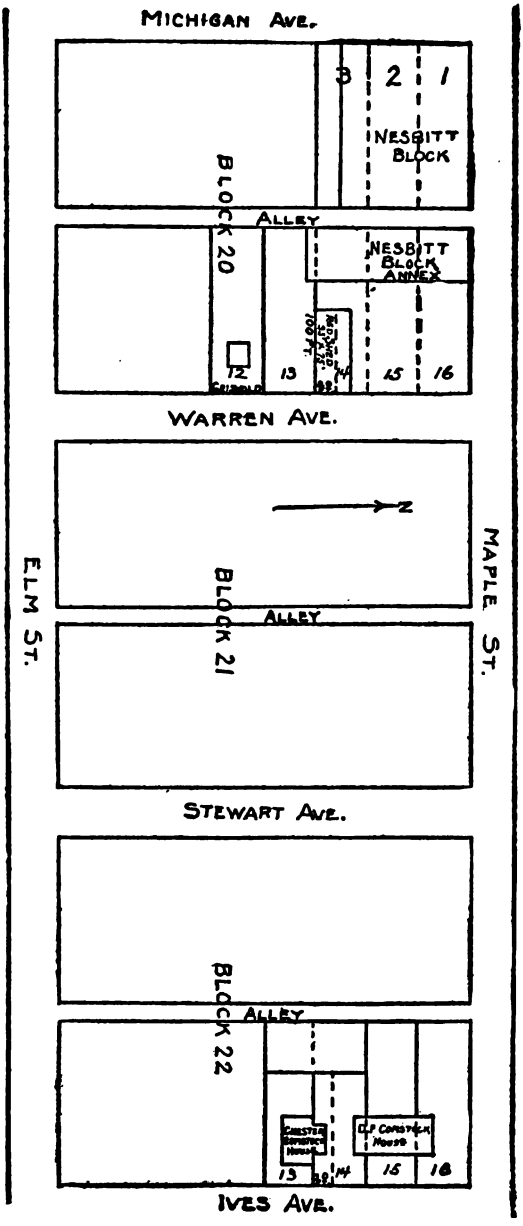

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(3) The recording of a quitclaim deed December 31, 1902, dated March 11, 1901, from Chester W. Comstock and wife to George W. Milner and wife.

These instruments all include other property than the land in suit, and, for the purpose of removing the cloud which they constitute upon complainants' title, they ask that they be reformed or set aside, so far as they purport to convey any interest in the strip in question.

The foregoing diagram will assist to a better understanding of the matter in dispute.

By this diagram, it appears that blocks 20, 21, and 22 lie close together, running from west to east, and separated only by the north and south streets. It also appears as to blocks 20 and 22 that they were similarly platted; that the northeasterly portion of each block was divided into four lots, viz., 13, 14, 15, 16; that each of these lots in block 20 was of the same area and in the same position as the corresponding number in block 22; that there was carved out of the southeasterly corner of lot 14 of each block a strip 20 by 100 feet, said strips being identical as to area and position on each lot 14.

Prior to December 22, 1891, Daniel F. Comstock was the owner in fee simple of lots 13, 14, 15, and 16 in block 20, and lots 13, 14, 15, and 16 in block 22. He also owned lots 1, 2, and the north half of 3 in block 20. At that time, Daniel Comstock had commenced the construction of a building, covering lots 1, 2, and the north half of 3, and the west 50 feet of lots 14, 15, 16, and part of 13, all in block 20. At the same time, he had commenced to build a shed 35 by 75 feet, on the southeast corner of lot 14, block 20. This shed covers the easterly 75 feet of the strip in dispute, but is 15 feet wider than the strip, and therefore covers an additional portion of said lot 14, lying immediately north of said strip. At this time, Daniel F. Comstock lived in his home, located on parts of lots 14, 15, and 16, block 22, and Chester Comstock, his son, lived in a house located on parts of lots 13 and 14, block 22. (See plat.)

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This being the situation, on December 21, 1891, Daniel F. Comstock executed a deed to Chester Comstock and wife, containing the following description:

"A strip of land, 100 feet long and 50 feet wide, off east end of lot 13, block 22, and a strip 20 feet wide and 100 feet deep, off lot 14, or the southeast corner of said lot 14, *block 20.*"

On the same day, Daniel executed a deed to his wife, Dolly, containing the following description:

"Lots 13, 14, 15 and 16, block 22, except lands deeded to Chester W. Comstock, which is part of lots 13 and 14."

On July 12, 1899, Dolly Comstock executed a deed to Chester W. Comstock and wife, containing the following description:

"Also (a piece of land) 100 feet long east and west, by 20 feet north and south, out of the southeast corner of lot 14, block 22."

On December 21, 1896, Chester W. Comstock and wife gave a mortgage, covering the strip in question and other lands, to George Young, his father-in-law, which mortgage was assigned to defendant George W. Milner March 1, 1901. On March 11, 1901, Chester W. Comstock and wife executed to defendants George W. Milner and Jennie M. Milner, his wife, a quitclaim deed covering the disputed strip.

Such of the foregoing instruments as relate to the 20-foot strip, on lot 14, block 20, together with the tax deed, from which complainants seek to redeem, constitute defendants' paper title to the strip in dispute.

Complainants' title thereto is based upon the following instruments:

(1) A mortgage from Daniel F. Comstock and wife to the Michigan Trust Company and Michael Brown, dated October 31, 1896, covering *all* of lots 13, 14, 15, and 16, block *20*, also other lands.

(2) The assignment of said mortgage by the mortgagees to the Michigan Trust Company, as receiver for

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the Mecosta County Savings Bank, dated November 21, 1896.

(3) The commissioner's deed on the foreclosure of said mortgage, dated December 21, 1898.

(4) Deed from Michigan Trust Company to M. Servetus Dart and wife, by order of the court, dated October 29, 1900.

(5) Deed from M. Servetus Dart and wife to complainants, dated October 30, 1900.

The record discloses the following facts: That defendant George W. Milner is the son-in-law of Daniel F. Comstock. That Jennie M. Milner is the daughter of Daniel and sister of Chester. That both said defendants lived for a time with Daniel after the failure of the Mecosta County Savings Bank. That defendant Milner knew there was something wrong about the description in the deed from Daniel to his son Chester, dated December 21, 1891. That he knew of the giving of the mortgage by Daniel to the Michigan Trust Company, knew of its foreclosure, and of the deeds to Dart and from Dart to complainants, and he knew these various instruments covered the strip in dispute. It is, in effect, conceded of record that a mistake was made in the description in the deed from Daniel to his son Chester, and that it was Daniel's intention to convey the 20-foot strip of lot 14, block 22, instead of the corresponding strip of lot 14, block 20. Since the purchase of the property by complainants, there has been a joint possession by them and defendants of the shed, located in part upon the disputed strip, and the taxes thereon have been paid by defendant. Complainants have sought to secure from defendants a quitclaim deed, and have offered to redeem from the tax deed, and repay the taxes. This being refused, they have filed their bill of complaint. From a decree dismissing the bill, complainants appeal.

BROOKE, J. (*after stating the facts*). In the foregoing statement of facts, we have said that it is, in effect, conceded of record that a mistake was made in the deed

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from Daniel to Chester. If it should be urged by counsel for defendants that the admissions of counsel do not amount to such concession, we have no hesitation in holding that there was a mistake in said deed. It is unnecessary to state at length the reasons which impel to this conclusion. A study of the instruments themselves, and a knowledge of the location of the house Daniel was deeding to Chester, will afford an absolute demonstration of fact.

. It is urged on behalf of defendant that complainants cannot maintain this suit to reform a deed, because they do not claim under the deed sought to be reformed. Complainants take the position that their bill is filed primarily to secure to them the right of redemption, and, incidentally, to remove certain clouds upon their title, and that equity having acquired jurisdiction upon one ground will retain it for the purpose of giving such relief as will dispose of the controversy, and in this view we agree. See *George* v. *Light Co.*, 105 Mich. 1 (62 N. W. 985), and cases there cited; *Hall* v. *Nester*, 122 Mich. 141 (80 N. W. 982).

It is clear from the record that when Daniel F. Comstock executed the mortgage to the Michigan Trust Company, in which was included this strip in dispute, he believed he was the owner thereof, and that in his deed to Chester he had conveyed title to the corresponding strip on lot 14, block 22.

It is equally clear that as between himself and Chester he had a right to file a bill to reform the deed to Chester, or to have it declared inoperative as to the strip in dispute. We have no hesitation in holding that this equitable right passed to the mortgagee, and from the mortgagee, through mesne conveyances, to the complainants. It may be said that such relief could not be granted to Daniel's suit, unless he had given to Chester the land intended, and it is urged that these complainants are not entitled to the relief because it is not in their power to convey to Chester's successors in title (the defendants) the corresponding strip on lot 14,

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block 22. The answer to this claim is that Chester got title to the last-named strip by deed from his mother, dated July 12, 1899, she having taken title thereto, on the same day Chester got his deed. It is apparent, therefore, that the mistake was rectified, so far as it could injuriously affect Chester, but it was not rectified by Chester redeeding to his father the strip erroneously included in the deed to him. Had he done so, such title as he possessed would of course have immediately vested in the mortgagee.

It is argued by defendants' counsel that complainants were not in possession of the strip, and that defendants were in possession; therefore, that complainants could not file a bill to remove a cloud upon the title—citing section 448, 1 Comp. Laws. We think the record shows a joint possession of the land in question, and, in any case, a party having an equitable cause of action, coming within any recognized rule of equity jurisprudence, may enforce the same in equity, whether in or out of possession. *Rowland* v. *Doty*, Har. Ch. (Mich.) 3; *Jones* v. *Smith*, 22 Mich. 360; *Waterman* v. *Seeley*, 28 Mich. 77; *King* v. *Carpenter*, 37 Mich. 363; *Eaton* v. *Trowbridge*, 38 Mich. 454; *Cleland* v. *Casgrain*, 92 Mich. 149 (52 N. W. 460).

In *Rowland* v. *Doty*, *supra*, the court said:

"The jurisdiction of this court (exclusive of any statutory provision on the subject) to set aside deeds and other legal instruments, which are a cloud upon the title to real estate, and to order them to be delivered up to be canceled, is fully established."

It is claimed, and the learned circuit judge held, that:

"Defendants George Milner and Jennie M. Milner were in actual and undisputed possession of the lands purchased at said tax sale for a period of more than five years from September 5, 1901, the date of the auditor general's deed, and before the commencement of this suit, and, by reason thereof, the said sale became absolute."

This we think was erroneous. The record shows that

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defendant did not go into possession under the tax deed, but was in possession before he obtained his deed. That such possession as he had was joint with that of complainants, and that, although he had actual notice of complainants' claim to the land, he served no notice to redeem upon them though he did serve such notices upon Chester W. Comstock and George Young, whose title he had then already acquired. Under these circumstances, his possession is no protection.

The decree is reversed, and a decree will be entered in this court, permitting complainants, upon repayment to defendants of taxes paid by them, together with interest thereon, to redeem from said tax deed, and setting aside and holding for naught the three instruments first described herein, so far as they relate to the lands in dispute.

BLAIR, C. J., and MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

JEWETT v. BRYANT.

1. EVIDENCE—EXPERT TESTIMONY—COMPARISON OF HANDWRITING—COMPETENCY OF WITNESS—STATUTES.

Testimony as to the identity of the maker's signature on a promissory note, based upon witness' knowledge of the writing of the maker obtained as supervisor from statements of assessable property made under 1 Comp. Laws, §§ 3841–3846, is not rendered incompetent by the provisions of the statute, which prohibit the use of such tax statement for any purpose except the assessment of taxes or the enforcement of the provisions of the act.

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2. SAME—CROSS-EXAMINATION.
Prejudicial error is not committed by a trial court, which excludes the testimony of a witness, asked on cross-examination whether he did not tell his attorney in another proceeding that the same maker's signature on another note held by an estate, of which the witness had been executor, was not genuine.

3. HUSBAND AND WIFE—PRINCIPAL AND AGENT—BILLS AND NOTES.
In the absence of testimony tending to show that a wife was authorized to sign a note in behalf of her husband, or borrow the amount in question, it is error to submit to the jury the question of her agency under the testimony that he had paid other notes so signed by her, to avoid trouble, and in the absence of a showing that he received any benefit from the transaction.

4. SAME—BY ESTOPPEL—RELIANCE ON APPARENT AUTHORITY.
The payee of a note who does not know that the maker holds out his wife as an agent to execute paper, and who takes the note in reliance on the genuineness of the maker's signature, may not recover on the theory that she relied on the wife's agency to execute the instrument.

5. SAME—AGENCY BY ESTOPPEL.
One who holds out another as his agent to borrow money is estopped to deny the authority as against another who knows of and relies on the apparent authority.

Error to Lenawee; Lockwood, J., presiding. Submitted November 12, 1909. (Docket No. 146.) Decided December 30, 1909.

Assumpsit by Harriett Jewett, executrix of the last will and testament of Alpha Phelps, deceased, against Wallace Bryant, administrator of the estate of Samuel Bryant, deceased, on a promissory note. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

Earl C. Michener and *Grant Fellows*, for appellant.

Burton L. Hart and *Smith, Baldwin & Alexander*, for appellee.

HOOKER, J. Bryant was a farmer; his wife's name

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being Helen. The record shows that she approached a Mrs. Phelps for a loan of $600 to send to her adult daughter, who was married and lived in the West. The loan being agreed upon, Helen Bryant offered her own note, which Mrs. Phelps declined to accept unless Mr. Bryant would sign it. Helen went away and afterwards returned with the note in suit, which bore her own and Bryant's names, and the money was paid to her by Mrs. Phelps, who took the note. Bryant's name was claimed to be a forgery, *i. e.*, it was not signed by him, nor was it signed with his knowledge or consent. The execution of the note declared on was denied as permitted by the rule. A verdict was rendered in favor of the plaintiff, and defendant has appealed. It may be stated that the original parties to the action are dead, and the same has been revived in the names of legal representatives. We will, however, use the words "plaintiff" and "defendant" as referring to the original parties. Counsel divide the questions as follows:

(1) Concerning the admissibility of certain testimony.
(2) Whether there were any questions for the jury except the genuineness of the signature.
(3) Was there proof of Helen's agency through estoppel?

The plaintiff claimed that the name was Bryant's genuine signature. One Baldwin testified that he was a supervisor, and that the only opportunity he had had to view signatures was taking statements of different men through the township. He saw them write their signatures. Upon this foundation he was allowed to compare the name on the note with an admittedly genuine signature and express the opinion that they were both made by the same person. The objection made was that "the statute relating to tax statements prohibits their use for the purpose of qualifying him as a hand-writing expert." The statute (1 Comp. Laws, § 3846) is as follows:

"But no such statement shall be used for any other purpose except the making of an assessment for taxes as

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herein provided, or for enforcing the provisions of this act."

This court, speaking through Mr. Justice GRANT (having this statute under consideration), said in the case of *Williams* v. *Brown*, 137 Mich. 569, 573 (100 N. W. 786, 787):

"The purpose of the statute evidently is to make these statements privileged except for the use specified in the statute. The language of the statute is emphatic and unambiguous. It prohibits their use for any other purpose than the making of an assessment and enforcing the provisions of the law."

This seems to us a novel application of the statute and decision, and we think that there was no error in holding that a man could testify from knowledge of penmanship thus obtained, so long as his testimony did not refer to any statement or the person who made it.

One Younglove testified that some years before he had seen Bryant write his (the witness') name on a petition, and expressed an opinion that the disputed signature was genuine. He had also been executor of an estate that held a similar note with a disputed signature, and in defendant's lifetime he had brought suit thereon against the defendant, who appeared and denied the execution of the note, and when it came to trial the case was discontinued and witness paid the costs. He claimed that his attorney discontinued the cause without his knowledge, consent, or authority. He was then asked if he did not tell his attorney in that case that in his judgment that note did not bear Bryant's genuine signature. The answer was excluded as a collateral matter. We are of the opinion that the case should not be reversed for this ruling.

Agency. The plaintiff claimed that there was testimony showing that Helen was the authorized agent of her husband with authority to make this note and notes generally; also, that, under the proof, he should be held to be estopped from denying her authority in this instance, and one or both of these questions were submitted to the jury. We are satisfied from our examination of the record that

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there is no evidence tending to show that Bryant authorized his wife to borrow this money or gave his note therefor. We are also convinced that there is no testimony warranting a finding that he ever gave her authority to borrow money generally upon his credit or to give his paper for loans. There is testimony that she had done it before, and that he had paid notes so made to avoid trouble and scandal; but there is no testimony that she was authorized to sign his name to notes generally or to borrow money for her own purposes, and there is no evidence indicating that he received this money or any benefit from it. We have gone carefully over the testimony and find nothing from which a legitimate inference can be drawn that Mr. Bryant ever gave his wife general authority to borrow money for her own purposes or to give paper in his name therefor.

Estoppel. Upon the question of estoppel, we understand that one who holds out another as his agent to borrow money is estopped to deny the authority as against one who knows of and relies upon such holding out in making a loan. If there is anything in this record that can be construed as a holding out of his wife, as one authorized to borrow money upon his credit, and to execute and give notes bearing his name, it does not appear that the plaintiff knew and relied upon it in making this loan. On the contrary, she acted upon the belief that she was getting a note bearing Bryant's genuine signature. There was no holding out to her, nor was there any understanding on Mrs. Phelps' part, that she was loaning money to one held out as an agent.

We think the court erred in submitting these questions to the jury, and that the only question to be submitted was that of the genuineness of the signature. The law upon these questions is elementary, and it is unnecessary to cite authorities.

The judgment is reversed, and a new trial ordered.

BLAIR, C. J., and OSTRANDER, MOORE, and BROOKE, JJ., concurred.

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PEOPLE *v.* POOLE.

1. CRIMINAL LAW—TRIAL—CONDUCT OF JUDGE—INSTRUCTIONS TO JURY.

   The following charge in a prosecution for manslaughter is open to the objection that it tends to inflame the minds of the jury: "This awful deed was committed in the broad light of day in the open streets of Ypsilanti, in bold and wicked defiance of all human and divine law. * * * So far as we know, on this April morning life was as sweet and precious to this poor wife and mother as it was to the prisoner. A more horrible or brutal death can scarcely be conceived. It shocked the senses of the entire community. There remains but little that you or I can do. We cannot restore life to this stricken woman; but we may do our share towards the guarding and protecting of human life hereafter."

2. SAME—HOMICIDE—MURDER—MANSLAUGHTER.

   It is error to charge the jury that the defendant, who killed his wife after being informed of her unlawful relations with another man, might be found guilty of no higher crime than manslaughter, if he was in a state of such excitement that his reason was dethroned and he was driven along by an uncontrollable and irresistible impulse so that he was no longer morally or legally responsible for his crime or what he was doing or where he was, and had gone some distance from this scene before he was able to recover himself and his senses.

3. SAME—INSANITY—MANSLAUGHTER.

   A respondent is guilty of manslaughter for killing a person, as distinguished from murder, if reason was at the time disturbed by passion to an extent which might render ordinary men of fair average disposition liable to act rashly or without due deliberation, and from passion rather than judgment.

4. SAME—EVIDENCE—CROSS-EXAMINATION.

   A respondent on trial for murder may be cross-examined after he has testified in his own behalf, as to any discrepancies between his testimony and a prior statement made by the respondent at the time of arraignment.

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Error to Washtenaw; Kinne, J. Submitted November 12, 1909. (Docket No. 164.) Decided December 30, 1909.

Alpheus Poole was convicted of murder in the first degree, and sentenced to imprisonment for life in the State prison at Jackson. Reversed.

A. J. Sawyer, Jr., for appellant.

John E. Bird, Attorney General, *George S. Law* and *Charles W. McGill*, Assistants Attorney General, and *Carl Storm*, Prosecuting Attorney, for the people.

BROOKE, J. Respondent was convicted of murder in the first degree. He was, at the time of the commission of the act for which he was prosecuted, a man 33 years of age, had been married 12 years, and lived with his wife and seven children in the city of Ypsilanti. The eldest child (born out of wedlock) was 14 years old. The youngest were twins about one year old. On the evening of April 28, 1909, respondent went home from work at the usual time. His wife was present and prepared the evening meal. She, however, did not eat it with the family, but left the house, going to a house about three blocks distant, in which one Henry Martin was living. At about 9 o'clock in the evening, respondent's wife not having returned, he went out to look for her. Not finding her at the home of an immediate neighbor, he went to the house of a Mrs. Hamilton, who was a second cousin of his own, and stepmother to Henry Martin. Respondent did not find his wife at the Hamilton home, so returned to his own home, and from there tracked his wife, in the new fallen snow, to the door of Henry Martin's house. He knocked, but got no response, and, after waiting around for a short time, again returned to his own home. At about 5 o'clock the next morning he again visited Mrs. Hamilton and told her his wife had stayed away all night. Mrs. Hamilton thereupon told him that an undue intimacy existed between

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his wife and Henry Martin, and that his wife had told her that Martin intended to marry her, and that she would go away with him and take the twins. Respondent then returned to the Martin house, gained admission, but did not find his wife there. Passing through the house, however, he opened the back door, and there saw fresh tracks in the snow. Following these for about four blocks, he overtook his wife, and, after walking with her a short distance and holding a brief conversation with her, he drew a razor and instantly killed her by cutting her throat. Respondent admitted the homicide, so that the sole question for the determination of the jury was whether respondent was guilty of murder in the first degree, murder in the second degree, or manslaughter.

There are 67 assignments of error. We will consider first those relating to the charge of the court. After properly defining the various crimes of any one of which the respondent might be convicted, the learned circuit judge proceeded as follows:

"The crime which you are now considering was not committed in secret or in the dark. This awful deed was committed in the broad light of day in the open streets of the city of Ypsilanti, in bold and wicked defiance of all human and divine law. You have heard the story of this crime from the lips of the prisoner and from others who were eyewitnesses thereto. You have been told what occurred at the time and the statements of the prisoner at the time. It is for you to bear in your minds and memory all of these facts and circumstances. So far as we know, on this April morning life was as sweet and precious to this poor wife and mother as it was to the prisoner. A more horrible or brutal death can scarcely be conceived. It shocked the senses of the entire community. There remains but little that you or I can do. We cannot restore life to this stricken woman; but we may do our share towards the guarding and the protecting of human life hereafter.

"It appears without dispute that this prisoner, on the discovery of his wife, that she had left the Martin residence, followed her tracks along the streets of Ypsilanti for several blocks, and he finally overtook her, walked

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with her some distance, and after some altercation drew his razor from his pocket and sent her instantly into eternity. He is here now pleading for mercy. If from the evidence in this case you find that he was in a state of such excitement that his reason was dethroned, that he was driven along by an uncontrollable and irresistible impulse so that he was no longer morally or legally accountable for his conduct, so that he did not realize his crime or what he was doing or where he was, and had gone some distance from this scene before he was able to recover himself and his senses, then, under such circumstances, the defendant in this case is guilty of no higher crime than manslaughter; but, gentlemen of the jury, if under the evidence in this case, you find that when this prisoner committed this deed there was anger, hatred, and malice in his heart, that he wickedly and wilfully applied this weapon of death to the throat of his wife intending to take her life, and that he did it deliberately knowing just what he was doing, and doing it because he wished to do it, then the defendant is guilty of murder.

"Now, gentlemen, under the evidence in this case, if you find the prisoner guilty, you can find him guilty of murder in the first degree, or murder in the second degree, or guilty of manslaughter, and it will be your duty, if you find him guilty, to find in your verdict the crime of which you find him guilty. In your deliberations there will be, I am sure, no hesitation or false sentimentality. To your sober and mature judgment are committed the rights of the people of this State, as well as the rights of the defendant."

It is urged on behalf of respondent that the portion of the charge above quoted is erroneous: (1) In that it tended to inflame the minds of the jury; and (2) that it improperly defined a condition of mind which would render respondent guilty of manslaughter only. With reference to the first point, it is sufficient to say that we think the charge is open to the objection urged. Touching the second, it is clear that that portion of the charge of the court, above quoted, in which he defines a condition of mind at the time of the homicide which would justify the jury in bringing in a verdict for manslaughter only, is entirely at variance with his earlier instruction to the jury

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upon that point, as well as contrary to the decisions of this court.

In the case of *Maher* v. *People*, 10 Mich. 212 (81 Am. Dec. 781), a case as to the facts much resembling the case at bar, this court declared the law on the subject under consideration as follows:

"It will not do to hold that reason should be entirely dethroned, or overpowered by passion, so as to destroy intelligent volition. [Citing cases.] Such a degree of mental disturbance would be equivalent to utter insanity, and, if the result of adequate provocation, would render the perpetrator morally innocent. * * * The principle involved in the question, and which we think clearly deducible from the majority of well-considered cases, would seem to suggest, as the true general rule, that reason should, at the time of the act, be disturbed or obscured by passion to an extent which *might render* ordinary men, of fair average disposition, *liable* to act rashly or without due deliberation or reflection, and from passion, rather than judgment."

So far as we have been able to learn, this rule has never been departed from in this State.

The record shows that, when arraigned, respondent admitted the homicide, and asked the court to determine what crime had been committed. The testimony of respondent was thereupon taken, and the court then directed that a jury be called to determine what crime had been committed, if any. Upon the trial respondent was again sworn in his own behalf, and in the course of his direct examination he detailed the conversation held with his wife, immediately preceding the homicide. On cross-examination the prosecutor was permitted, over objection, to go into his testimony upon the same subject given before the court at the earlier hearing. Respondent assigns error upon this ruling of the court. We do not think the objection well taken. Having testified (at the trial before the jury) as to what was said by himself and deceased immediately before the homicide, it was competent for the prosecutor to show that he had given a different ver-

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sion of the conversation under oath upon his first examination.

The other assignments of error have been considered, but need no discussion.

Because of the errors pointed out, the judgment is reversed, and a new trial ordered.

BLAIR, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

PEOPLE v. NICHOLS.

1. INDICTMENT AND INFORMATION—AMENDMENT—TIME—PLEADING.
An information which charges an offense under videlicet on August 18th, may be properly amended by changing the date to July 18th. 3 Comp. Laws, §§ 11919, 11936.

2. RAPE — STATUTORY OFFENSE — ELECTION OF OFFENSE RELIED ON.
Evidence of a subsequent offense is not admissible after the introduction of evidence fixing the time and offense relied on in a prosecution for statutory rape.

3. SAME—EVIDENCE—TIME OF OFFENSE—INFORMATION.
Where the information charged respondent with an offense on, "to wit, July 18th," and the prosecuting attorney in his opening statement announced that he relied on an act committed about a week prior to July 18th, evidence of an offense committed two weeks before that date was admissible.

4. SAME—EVIDENCE—PREVIOUS ACTS.
Previous or subsequent acts of intercourse are admissible to corroborate the evidence of the offense charged, but not to sustain a conviction for a separate offense.

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5. SAME—EVIDENCE—CONFESSIONS AND ADMISSIONS.
The written admissions of a girl of thirteen years of age, as to statutory offenses committed by the respondent, are not admissible as substantive proof for the purpose of convicting the accused, and are only competent to impeach the witness.

6. SAME—TRIAL—INSTRUCTIONS.
The jury should be instructed, if so requested by respondent, that to warrant a verdict of guilty the jurors must unanimously find that the accused committed the act as testified to.

7. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY—IMPROPER COMMENT.
The statement in the argument of the prosecuting attorney upon his official oath that a certain witness testified truthfully, is a fatal error. *People* v. *Treat*, 77 Mich. 348 (43 N. W. 963).

Error to Calhoun; North, J. Submitted November 15, 1909. (Docket No. 167.) Decided December 30, 1909.

Jerome E. Nichols was convicted of statutory rape, and sentenced to imprisonment for not less than five nor more than fifteen years in the State prison at Jackson. Reversed.

W. S. Powers, for appellant.

Howard W. Cavanagh, Prosecuting Attorney, for the people.

HOOKER, J. The respondent appealed from a conviction of the offense of statutory rape upon a girl under the age of 16. The evidence offered by the people consisted of:

(1) The testimony of the girl, Marguerite La Parl.
(2) Testimony of persons who saw the parties in respondent's office.
(3) Testimony of an officer and the justice who took the complaint as to statements made by the girl.
(4) Certain writings containing statements regarding the relations of the parties, over the signature of the girl.

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The questions raised relate to:

(1) The charge made against respondent, and the duty of election.
(2) The admissibility of the girl's extrajudicial statements.
(3) Exclusion of questions on cross-examination of the girl.
(4) The admissibility of certain affidavits made by the girl.
(5) The charge of the court in relation to extrajudicial statements.
(6) Remarks of prosecuting attorney.

The respondent was charged in the information with an offense committed on July 18th, though it was laid under a *videlicet;* the examining magistrate having bound defendant over on a charge of rape alleged to have been committed on that day. The information as originally drawn charged an offense on August 18th. A motion being made to quash the information for a variance, the court permitted the prosecutor to amend it to read July 18th. Error is assigned on this. We are of the opinion that the court did not err in denying the motion to quash and allowing the amendment. Sections 11919, 11936, 3 Comp. Laws; *Cole* v. *People*, 37 Mich. 544; *People* v. *Waller*, 70 Mich. 237 (38 N. W. 261); *People* v. *Hildebrand*, 71 Mich. 313 (38 N. W. 919); *People* v. *Perriman*, 72 Mich. 184 (40 N. W. 425); *People* v. *Price*, 74 Mich. 37 (41 N. W. 853); *People* v. *Hamilton*, 76 Mich. 212 (42 N. W. 1131); *People* v. *Roat*, 117 Mich. 578 (76 N. W. 91); *People* v. *Hoffmann*, 142 Mich. 531 (105 N. W. 838).

At the opening of the trial the prosecuting attorney announced that the offense relied on occurred about a week prior to the 18th of July. The girl, Marguerite La Parl, being sworn, testified that she worked in the office of the respondent, and that the last she did so was July 18th. Being asked whether at any time before that she had improper relations with respondent, she stated that she had one night when she went there after school, and before

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she began working there. The witness being interrogated further, defendant's counsel objected, claiming that by offering the foregoing proof the prosecutor had fixed the time of the offense for which he sought conviction, and assigns error on the overruling of his objection. The witness was then allowed to testify to an act of sexual intercourse on an occasion when respondent placed her upon some pillows upon a stand in the corner of his back room, and apparently this was the occasion for which conviction was sought, and she stated that she thought it was about two weeks before July 18th. There was testimony in the case of intercourse, both before and after this occasion. The former was admissible, and the latter was not, provided, of course, that it was proper to treat this occasion as the instance for which respondent was on trial. The rule is settled in the case of *People* v. *Brown*, 142 Mich. 622 (106 N. W. 149). See, also, *People* v. *Jenness*, 5 Mich. 305.

Counsel urge, *first*, that the proof of the act in June was an election, and that, if not, the prosecutor's statement to the jury that he relied on an act that was committed about a week before July 18th must be considered as fixing the offense as of July 11th. We find no difficulty in holding that the act of two weeks before July 18th was sufficiently described in the information, inasmuch as the date of July 18th was preceded by the *videlicet*. The opening of the prosecutor should not be held to be an election to prove and rely on an offense committed on July 11th. He did not definitely fix the date.

The more serious question relates to the effect of the proof first offered relating to the act in June. If we must hold this to have constituted an election notwithstanding the fact that the prosecutor at once disavowed such election, and consistently claimed conviction for the later act, we must reverse the case:

(1) Because the proof of the later act was inadmissible.
(2) Because the jury were permitted to find a verdict of guilty based on the later transaction.

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The claim of defendant's counsel is based on the opinion in the early case of *People* v. *Jenness*, 5 Mich. 305.

We insert the testimony of Marguerite La Parl, the first witness sworn, to show the exact situation. After the opening to the jury, which plainly indicated reliance upon the act about a week prior to July 18th, she testified that she went to work at defendant's office right after school let out and worked about four weeks. She continued as follows:

"*Q.* Now, Marguerite, do you remember the last day you worked there?

"*A.* Yes, sir.

"*Q.* Do you remember what day of the month it was?

"*A.* July 18th.

"*Q.* What day of the week?

"*A.* Saturday.

"*Q.* Now, at any time before that, had you had improper relations with Mr. Nichols?

"*A.* Yes, sir.

"*Q.* And when, before that, Marguerite, as near as you can tell?

"*A.* It was one night when I went there after school.

"*Q.* Was it before or after you began working there?

"*A.* Before. * * *

"*Q.* Did you at any time have such relations with Mr. Nichols?

"*Mr. Dennison:* I object to that question as irrelevant, incompetent, and immaterial. Counsel has asked this witness: 'Did you have improper relations, or did Mr. Nichols do anything to you?

"*A.* Yes, one night when I was going to school.' Mr. Stewart has now fixed the time on which he seeks to get a conviction Any subsequent time is incompetent, immaterial, and irrelevant.

"*The Court:* I shall overrule the objection. He has indicated in his opening statement when he desires to fix it."

From what has been already said, it is apparent that, had the testimony first offered related to the later transaction, as the one relied on, proof of the former would have been competent, under the case already cited, as well as under *People* v. *Jenness*, and we are reluctant to hold

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that a variation in the order of proof clearly competent should have the effect claimed for it. While the opinion in *People* v. *Jenness* at first blush may seem to hold just that, it is in our opinion clearly distinguishable. That was an incest case. The proof first offered related to an act committed on January 17th. Afterwards one or more acts were proved, against objection. The court said:

"It was not claimed by the prosecution, and could not legally be claimed, that it was competent to convict the defendant of more than one act under this information. But the prosecutor having the right to select among all the acts of the kind which he could prove to have been committed between the parties, within the period alluded to, and within the jurisdiction, any one of those acts, before evidence had been introduced, was as properly the act charged in the information as any other. In other words, until evidence of some such act had been given, the charge in the information was floating and contingent, aimed as much at one as another, and at no one act in particular; and it remained for the evidence to point the charge to the particular act intended. But when evidence had been introduced tending directly to the proof of one act, and for the purpose of procuring a conviction upon it, from that moment that particular act became the 'act charged.' What had, till then, been floating and contingent, had now become certain and fixed. The prosecutor had made his election, and could not elect again; nor could he be allowed to prove any other act of the kind as a substantive offense upon which a conviction might be had in the cause. The information could be used as a dragnet only till the first act had been entangled in its meshes; every other act must be allowed to escape this throw of the net, and thenceforward the evidence must be aimed at this act. If others of the same kind lie in the same range, they can only be noticed for a secondary purpose, as they may be connected with or bear upon this.

"The act at the Howard House being the first to which evidence was introduced, and the evidence bearing directly upon that act, became from that moment the only offense charged—the only offense the jury were to try, and to which their verdict of guilty or not guilty must relate. Such must have been the view taken by the recorder when

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the evidence of previous acts of intercourse was admitted; as he admitted evidence of such acts 'not as substantive offenses, but in explanation and corroboration of the evidence of the act charged in the information.'

"But, after the evidence had been admitted for this purpose, the prosecuting attorney changed his ground, and claimed that the jury might select any one of the acts on which evidence had been given as the ground of their verdict."

In that case the prosecutor intended to rely upon the act of January 17th for a conviction when he offered the proof, and the case went to the jury upon several acts. In this case he did not, as the record clearly shows, for it was disavowed on the spot, and the proof was limited to the purpose for which it was clearly admissible. We are therefore of the opinion that there was no error in admitting proof of the later and all intervening transactions of similar character. It was not proper to admit proof of acts subsequently committed, however, if offered first by the prosecutor. We are of the opinion that a plain and sufficient election was made. There was testimony, however, regarding an act on July 18th. It was drawn out on the direct, and was improper.

We may remark here that the defendant was entitled to an instruction that to warrant a verdict of guilty the jurors must unanimously find that he committed the act testified to, as committed on the stand, if requested.

The record indicates that this girl was old in vice, though young in years. The prosecutor showed by her that she did not tell her parents, because "defendant told her not to, and that it would mean State's prison for him if she did." Thereupon the prosecutor was permitted to show that some time after the transaction an officer named Buckley, who had got wind of the matter, approached her parents about it, and had an interview with the girl, who admitted and signed a written statement of the facts. She subsequently went, or was taken, before a magistrate, and signed a second statement in relation to the affair. These writings and the testimony of the of-

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ficer and justice got into the case. There is some dispute as to which party caused its introduction, and, as the cause must be reversed on another ground, it is enough to say that it was not competent evidence for the people, and could properly be used by the defendant only by way of impeachment. We do not find it necessary to determine its effect upon this trial for the reason stated, but indicate our understanding of the rule for the purposes of another trial, should one be had.

Complaint is made of the charge regarding the use to be made of the signed statements, in that the jury are said to have been instructed that they might consider them as corroborating the testimony of Marguerite La Parl. The exact question appears to be whether the court should not have limited the use of this proof to the determination of her truthfulness, and whether he did not go too far in saying that:

"I think I have already called your attention to the fact that certain statements of Marguerite La Parl are in evidence here, which have been reduced to writing. I now call your attention particularly to the return of the justice of the peace which was introduced as a part of the testimony here, and to which your attention has been repeatedly called. That testimony is not substantive proof; that is, it is not original and competent proof of the guilt of the accused. But you are to view the statements there, and to use them for this purpose only, namely, of its being either contradictory testimony relative to former statements of Marguerite La Parl, or corroborative testimony, and to assist you in construing her testimony as given here in court, and in determining its truth or untruth, to the extent that it will aid you as a piece of evidence for that purpose, and it is not primary proof of the offense charged."

We are satisfied that the learned circuit judge intended to limit the application of this testimony to the question of the girl's veracity, but fear that the jury may not have so understood it. Certainly, if they understood that it was to reinforce and corroborate her testimony as to the substantive facts, it was injurious.

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Cunningham, a witness for the people, testified to observation of certain conduct of respondent and this girl in the former's office, that what he saw was from the opposite side of the street, and it tended to corroborate the statements of Miss La Parl. He said that on one occasion the prosecuting attorney was also there. Apparently the credibility of this witness was questioned in the course of the argument of defendant's counsel. This is the record [opinion of trial court]:

"So far as the prosecuting attorney is concerned, the only matter which approached an irregularity, in my judgment, and concerning which complaint was made or exception taken at the trial, was the following:

"'*Mr. Stewart:* I will say, however, upon my official oath, that I know when Mr. Cunningham told certain things upon the stand he told the truth.

"'*Mr. Dennison:* We object and take an exception to counsel for the people giving testimony before the jury that we cannot cross-examine him upon.

"'*Mr. Stewart:* I will say it again. I will say it again to you, gentlemen, that I did not have to take the stand here; but I say that I know that Mr. Cunningham was a truthful witness so far as some things were concerned.

"'*Mr. Dennison:* We take an exception to that.'

"The foregoing was provoked by certain heated remarks made to the jury by Mr. Hooper, one of the counsel for the defendant, who referred to certain testimony given by Mr. Cunningham but subsequently stricken from the record, and stated that in giving such testimony Cunningham had 'branded himself (Cunningham) a liar.' It appeared in the testimony that on one occasion the prosecutor was with Mr. Cunningham at the point where Mr. Cunningham claimed he observed certain things relative to which he testified, and the only fair import to be given to the remarks of the prosecutor is that as to some of these circumstances he had personal knowledge, and this appeared in the evidence. And, moreover, there was no dispute in the evidence as to Cunningham having been across the street from the defendant's office and having made certain observations; but his statement in this regard was corroborated by other testimony; and it was this to which the prosecutor's remarks referred, and to me

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it seems beyond question that it was not in the least prejudicial to the rights of defendant. I do not find the prosecutor made any remarks not justified by the testimony."

This was a fatal error. It was practically the introduction of unsworn testimony corroborative of Cunningham. The case of *People* v. *Treat*, 77 Mich. 348 (43 N. W. 983), was a similar case. In that case not only was the prosecutor instantly and severely rebuked by the trial judge in the presence of the jury, but all was done that could be done to counteract the effect of his statement. Yet this court, upon a record most convincingly showing defendant's guilt, felt constrained to say that injurious error had been committed, which the trial court was powerless to correct. It is unnecessary to discuss the case further.

The judgment is reversed, and a new trial ordered.

BLAIR, C. J., and MOORE, MCALVAY, and BROOKE, JJ., concurred.

CITY OF BENTON HARBOR *v.* CUTLER.

MUNICIPAL CORPORATIONS — BOUNDARIES — REPEAL BY IMPLICATION.

The rule that a local board of supervisors may not change the boundaries of a municipality under Act No. 215, Pub. Acts 1895, 1 Comp. Laws, § 2974, where the legislature has intervened by special act and made such change, subsequent to the enactment of the general law, is not applicable to the change in the boundary of the city of Benton Harbor under the general law, in view of subsequent special acts of the legislature expressly providing that the general law should govern that municipality.

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Error to Berrien; Coolidge, J. Submitted November 10, 1909. (Docket No. 180.) Decided December 30, 1909.

Fred J. Cutler was convicted of violating a city ordinance. Affirmed.

Cady & Andrews, for appellant.

Frank L. Hammond (*Humphrey S. Gray*, of counsel), for appellee.

OSTRANDER, J. Defendant was convicted of violating an ordinance of the city of Benton Harbor. His defense was, and is, that the ordinance has no force in the territory in which its violation is alleged to have occurred because the territory is outside the boundaries of the city. The city was incorporated, as of the fourth class, under provisions of Act No. 215, Pub. Acts 1895 (1 Comp. Laws, §§ 2956–3371). By Act No. 472, Local Acts 1903, entitled: "An act to reincorporate the city of Benton Harbor, Berrien county, Michigan," the boundaries of the city are established, ward boundaries are fixed, and various powers are conferred and limited. Again, in 1905 (Act No. 661, Local Acts 1905) amendments were made by adding certain sections to the act of 1903. It is set out in the statement of agreed facts and in the briefs that the act last mentioned changed the boundaries of the city. Reference to the act as printed in the official volume of local acts for the session of 1905 does not support this statement. The territory in question was not, by the legislation referred to, brought within the boundaries of the city. In April, 1909, by proceedings admitted to have been regular, in accordance with the provisions of 1 Comp. Laws, § 2974, the board of supervisors of Berrien county detached certain territory, including that in question here, from the township of Benton and annexed it to

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the city of Benton Harbor. Section 11 of the local act of 1903 reads as follows:

"Except as herein provided the said city of Benton Harbor shall be subject to the provisions of act number two hundred and fifteen of the public acts of the State of Michigan for the year one thousand eight hundred and ninety-five, entitled," etc.

The local act of 1905 contains (section 22) a like provision.

The question presented, the only one stated in the submission of the case below, is whether the board of supervisors had power to alter the boundaries of the city established by the legislature. The right of local authorities, acting under provisions of general laws, to change boundaries fixed by special acts of the legislature, was denied in *School District No. Thirteen* v. *Dean*, 17 Mich. 223, and in *Township of Harrison* v. *Board of Sup'rs of Schoolcraft Co.*, 117 Mich. 215 (75 N. W. 456); in one case school district, and in the other township, boundaries being involved. The reasoning indulged by the court in the opinions filed in those cases need not be repeated here. There is this distinction between those cases and the case at bar: The legislature in this case has, in effect, provided, and that expressly, that the measure of the powers of the particular municipality shall be found in the special acts which have been referred to and in the general law. The special act establishes boundaries with no provision for their change. The general law provides a method for changing boundaries. It is as though the legislature had in the first instance established the boundaries of the city and enacted, as the charter of the city, all provisions of the special acts and all applicable provisions of the general law. In such a case it would not be supposed that, having expressly provided a method for changing boundaries by the action of local officers, such a method could not be pursued because the legislature had itself established boundaries. I find in the legislation itself a clearly expressed intention not to deny the right to proceed under the gen-

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eral law to change the boundaries of the city. It follows that the boundaries were lawfully changed, and the ordinance of the city was in force in the added territory.

The conviction is affirmed. No costs are awarded.

MONTGOMERY, HOOKER, MOORE, and MCALVAY, JJ., concurred.

McDONALD v. MARQUETTE CIRCUIT JUDGE.

1. EMINENT DOMAIN—PUBLIC NECESSITY—ADMISSIONS IN ANSWER.
In proceedings to take private property for public use as a cemetery, an answer which admits that the cemetery in use is crowded and that public health and convenience require the selection of a new cemetery, constitutes a sufficient admission of the necessity of the public improvement and limits the issue to the question of the necessity for taking the defendant's property.

2. SAME—ISSUES—STRIKING OUT PORTIONS OF ANSWER.
Mandamus will not lie to compel a circuit judge to vacate an order striking out portions of an answer to a petition in such proceedings, where the answer attempted to place in issue immaterial questions relating to the interest of private parties who agreed to bear the expense of removing the bodies from the old cemetery to the proposed new one, in consideration of mining privileges in the former, and where other portions struck out related to the question of damages.

Mandamus by Catherine McDonald to compel John W. Stone, circuit judge of Marquette county, to vacate an order striking out portions of an answer to a petition in condemnation proceedings. Submitted November 16, 1909. (Calendar No. 23,641.) Writ denied December 30, 1909.

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Cummiskey & Spencer, for relator.

T. A. Thoren (*William P. Belden*, of counsel), for respondent.

The city of Negaunee filed a petition in the circuit court for the county of Marquette to condemn a piece of land belonging to the relator for the purposes of a public cemetery. It is conceded that all the proceedings taken are regular, and that the petition alleges all the essentials to jurisdiction. The relator answered, and the question now before the court arises on the allegations of section 5 of her answer, which is as follows:

"Respondent is informed and admits that the cemeteries now in use in the city of Negaunee are filled up and crowded, and that the public health and convenience require the selection and adoption of a new cemetery; *but the respondent shows that it has been discovered that, under the present cemeteries, there is a large deposit of iron ore, that the city of Negaunee, before passing the resolution referred to in paragraph 3 of the petition, had entered into a contract with the Cleveland-Cliffs Iron Company, wherein it provided that the said Cleveland-Cliffs Iron Company may enter said public cemeteries now in use in the city of Negaunee, and mine and remove said deposit of iron ore, upon terms of payment provided for in the contract.*

"*Respondent further shows that by the terms of said contract the said Cleveland-Cliffs Iron Company have agreed to furnish and provide, at its own expense, for the said city of Negaunee, a piece of land suitable for cemetery purposes. It is also provided in said contract that the said Cleveland-Cliffs Iron Company will remove the bodies in the present cemeteries to such new cemetery at their own expense.*

"Respondent further shows that the present cemeteries are of about 10 acres in extent, and have been in use as cemeteries and been sufficient as cemeteries for the said city of Negaunee since its settlement and establishment.

"Respondent further shows that pursuant to the (*an*) agreement with the city of Negaunee, the Cleveland-Cliffs Iron Company purchased of Charles and Napoleon Mar-

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quetty 40 acres of land adjoining the land described in the petition on the east, and that it is designed to use this said 40 acres of land for a burial ground for the city of Negaunee.

"Respondent further shows that, for burial purposes, this said 40 acres would be sufficient for the city of Negaunee for any reasonable period of time in the future, and that it would not be necessary to acquire respondent's land for cemetery purposes, to be used in addition to said 40 acres of land, *were it not for the provision in petitioner's contract with the Cleveland-Cliffs Iron Company that the said Cleveland-Cliffs Iron Company remove the bodies from the present cemeteries.*

"*Respondent further shows that the removal of the bodies are not necessary, except for the profit and emolument which the said Cleveland-Cliffs Iron Company may derive from the removal of said deposit of iron, by undermining the cemeteries now in use, and that this proceeding therefore is only made necessary by, and is a condemnation of private property for, the use, convenience, and profit of a private corporation, and is not in any sense necessary for the use of the petitioner, in addition to the land already available and ready to be placed at the disposal of the said petitioner.*

"*Respondent further shows: That the said Cleveland-Cliffs Iron Company desire to obtain title to the portion of the 40-acre tract described in said petition, not designed to be used for cemetery purposes, lying south of the county road and west of the Carp river; that the said Cleveland-Cliffs Iron Company has a dominating influence in the affairs of the city of Negaunee;* that the portion of respondent's 40-acre tract here sought to be condemned is the most valuable part of said 40-acre tract, and is necessary to the enjoyment of the said 40-acre tract, in this: That upon this portion of the 40-acre tract, the main part of the clearing has been done. It is the only high portion of the said 40-acre tract available for general farming purposes, and upon this portion stands the house and barn of said respondent.

"*Respondent is informed and believes that the said Cleveland-Cliffs Iron Company procured the selection of the land described in the petition, for the purpose of depreciating and deteriorating the value of the remaining part of the 40-acre tract, in order that they*

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might acquire it from respondent at a low figure, and that in this respect the said condemnation proceeding is also for the benefit, profit, and convenience of a private corporation.

"Respondent further shows that there are other parcels of land suitable for cemetery purposes, more conveniently located with reference to the city's center of population, than the land herein proposed to be condemned, and that the Cleveland-Cliffs Iron Company own and have title to parcels of land so available for cemetery purposes.

"Respondent further shows that she is informed and believes that there is a deposit of iron underlying the premises so sought to be condemned, and that the condemnation of the surface estate of said land will destroy the value of any mineral deposit that may underlie the same, since the removal of such mineral deposit would create the same condition as makes necessary the removal of the bodies from the present cemeteries now in use by the city of Negaunee."

Counsel for the city moved the court to strike out certain parts of the answer. The court entered an order striking out those parts above printed in italics. The relator now asks that the respondent be compelled to set this order aside.

GRANT, J. (*after stating the facts*). The answer admits the public necessity of a new cemetery by the admission that the old cemeteries are filled up and crowded, and that the public health and convenience require the selection and adoption of a new cemetery. The only question therefore left for the court to determine is the necessity of taking the relator's land. This question is not at all affected by the fact that private parties may be interested in securing the vacation of the old cemeteries, and may agree to bear the expense, in whole or in part, of removing the bodies, gravestones, and monuments to a new cemetery. *Hairston* v. *Railway Co.*, 208 U. S. 598 (28 Sup. Ct. 331); *Pere Marquette R. Co.* v. *Gypsum Co.*, 154 Mich. 290–299 (117 N. W. 733); *Chicago, etc., R. Co.* v. *Morehouse*, 112 Wis. 1 (87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918).

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If the parties interested made an agreement by which the Cleveland-Cliffs Iron Company have provided burial ground upon which to remove the bodies in the old cemeteries, that is no concern of the relator. If the alleged purchase by the Cleveland-Cliffs Iron Company is for future burials, and not alone for the removal of bodies from the old cemeteries, it will become, upon the hearing of the trial, a legitimate inquiry whether the land so furnished is sufficient for present and future needs. That may affect the question of the necessity of taking the relator's land. It is a fair inference from relator's admission that the public health may require the removal of the old cemeteries, and, if the Marquetty 40 was purchased by the Cleveland-Cliffs Iron Company and conveyed to the city for that purpose alone, it will not affect the necessity of acquiring land for a new cemetery. Neither is it of any significance or importance that the Cleveland-Cliffs Iron Company may desire that the city should secure the higher portion of relator's land in order to diminish the value of the adjoining portion of her land for mining purposes. That relates to the question of her damages. Neither is it of any importance that the Cleveland-Cliffs Iron Company herein exercises a predominating influence in the municipal government of the city. The sole question is the necessity of taking the relator's land. The issues raised by that portion of her answer stricken out have no bearing upon the question.

The writ is denied.

MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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POWERS *v.* HOUGHTON.

MALICIOUS PROSECUTION—CIVIL ACTION—ABUSE OF PROCESS.

The defendant in an action of replevin, in whose favor the action was decided, cannot maintain case for malicious prosecution of the civil action where he had sold the property previously to its seizure under the writ of replevin, and had no property interest in the chattels taken.

Error to Shiawassee; Miner, J. Submitted November 19, 1909. (Docket No. 30.) Decided December 30, 1909.

Case by Joseph Powers against James D. Houghton and John D. Haskins for malicious prosecution. A judgment for plaintiff is reviewed by defendants on writ of error. Reversed.

Samuel G. Houghton and *Chandler & Friegel*, for appellants.

Odell Chapman (*Kilpatrick & Pierpont*, of counsel), for appellee.

BROOKE, J. On October 6, 1905, defendants herein sued out a writ of replevin against the plaintiff herein, before a justice of the peace for Shiawassee county, under which 16 lambs were, by the officer, taken and turned over to defendants. That action resulted in a verdict in favor of plaintiff herein, and the lambs in question were returned to him, the costs were paid by defendants herein, and no appeal was taken. In December, 1906, plaintiff brought suit against defendants, in an action of trespass on the case, for malicious prosecution. Upon the trial, plaintiff herein testified that he had sold the lambs in question on October 3, 1905, to one Collister, receiving from Collister $5 upon the purchase price thereof. This was three days before the writ of replevin was issued. The lambs were taken from him under the writ, when he

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was in the act of delivering them to Collister. Plaintiff recovered a judgment, and defendants have sued out a writ of error.

We have, then, in the case at bar, this situation: The plaintiff seeks to recover damages for the malicious prosecution of a civil action, by which he was deprived of neither his liberty, reputation, nor property, but simply of the possession of property belonging to another. Pollock, in his work on Torts (8th Ed.), at page 316, states the rule as follows:

"Generally speaking, it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even if malice be proved. For, in contemplation of law, the defendant, who is unreasonably sued, is sufficiently indemnified by a judgment in his favor, which gives him his costs against the plaintiff."

See, also, *Quartz Hill Gold Mining Co.* v. *Eyre*, L. R. 11 Q. B. Div. 674, 52 L. J. Q. B. (N. S.) 488, where it said:

"In the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."

This is the English rule, which has been somewhat modified in America. In 1 Cooley on Torts (3d Ed.), at page 345, the rule is stated to be that:

"In some cases an action may be maintained for the malicious institution of a civil suit, but the authorities are not entirely agreed what cases are embraced within the rule."

Among those malicious civil suits giving a right of action, he enumerates arrest, attachment, garnishment, insanity cases, injunctions, receivers, and other suits that interfere with person or property. Under the last class of cases, he says (page 348):

"So a suit for malicious prosecution will lie where the plaintiff's property or business has been interfered with,

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by the appointment of a receiver, the granting of an injunction, or by writ of replevin."

As supporting the text touching writs of replevin, he cites *Brounstein* v. *Sahlein*, 65 Hun, 365 (20 N. Y. Supp. 213); *McPherson* v. *Runyon*, 41 Minn. 524 (43 N. W. 392, 16 Am. St. Rep. 727). Both of these cases have been examined. In the first, not only was the plaintiff's property interfered with, but his business was largely injured. In the second, property of the plaintiff had been taken on the writ.

In our own State, the case of *Brand* v. *Hinchman*, 68 Mich. 590 (36 N. W. 664, 13 Am. St. Rep. 362), is to some extent applicable. There, an attachment was sworn out by defendant, Hinchman, and placed in the sheriff's hands for service. A deputy visited Brand's store, but made no actual levy, the subject-matter of the suit being adjusted. This court found, however, that there was at least a technical taking and possession of Brand's property, and the proofs showed that damage resulted to his business as a result of the swearing out of the writ (without probable cause).

The case of *Antcliff* v. *June*, 81 Mich. 477 (45 N. W. 1019, 10 L. R. A. 621, 21 Am. St. Rep. 533), is authority for the proposition that a gross and fraudulent abuse of the process of the court, resulting in damage, gives a right of action to the person sustaining the damage.

But we have been unable to find a single adjudicated case (and counsel for plaintiff has called our attention to none), where it is held that the defendant in a replevin suit, having no property in the goods taken, may maintain an action for malicious prosecution against the unsuccessful plaintiff in the original action. The authorities are not harmonious upon the question, where the property of the defendant in the original action is taken, and upon that question we express no opinion.

The judgment is reversed and a new trial ordered.

BLAIR, C. J., and HOOKER, MOORE, and MCALVAY, JJ., concurred.

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PRATT v. BROADWELL.

LIMITATION OF ACTIONS—RECEIVERS—INSURANCE—CORPORATIONS—LIABILITY OF STOCKHOLDERS—ASSESSMENTS.

The statute of limitations begins to run against an assessment of stockholders in a mutual insurance company, assessed by the receiver under an order of the court, from the date when notice of the assessment was served, not from the end of the period named therein for payment although the notice stated that suit would be brought after thirty days from such service.

Error to Van Buren; Des Voignes, J. Submitted November 17, 1909. (Docket No. 53.) Decided December 30, 1909.

Assumpsit by Frank S. Pratt, receiver of the Michigan Manufacturers' Mutual Fire Insurance Company, against William M. Broadwell for the amount of an assessment on a policy of insurance. A judgment for defendant is reviewed by plaintiff on writ of error. Affirmed.

David Anderson and *Glenn E. Warner* (*Frank S. Pratt*, of counsel), for appellant.

Russell M. Chase, for appellee.

BROOKE, J. The facts in this case are stipulated as follows:

"The Michigan Manufacturers' Mutual Fire Insurance Company was organized under sections 7,317 to 7,336 of the Compiled Laws of Michigan of 1897. On the 13th day of February, 1901, Chester L. Collins, of Bay City, Michigan, was, upon the petition and motion of the commissioner of insurance of the State of Michigan, by an order made and entered in the circuit court for the county of Bay, State of Michigan, in chancery, in cause No. 3,177, duly appointed receiver of said insurance company,

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with full power to levy and collect by suit, if necessary, any legal assessments made against the members and policy holders of said insurance company.

"On the 27th day of July, 1901, the said Chester L. Collins, receiver, was, by an order of the circuit court, in chancery, for the county of Bay, State of Michigan, directed to levy an assessment of $50,000, or thereabouts, against the members and policy holders of the said insurance company.

"On the 27th day of August, 1901, said Chester L. Collins, receiver, levied an assessment against the policy holders and members, and the proportionate part of said assessment of $50,000 against the defendant and his policy was $33.82. Such sum is conceded to be correct.

"Section 10 of the articles of association provides for the levying and collection of assessments upon the policy holders, a copy of which said articles of association and section 10 is hereto annexed, marked 'Exhibit A,' and made a part of this stipulation.

"Paragraph 6 of the order of the said circuit court, in chancery, of Bay county, making the assessment, to collect defendant's portion, of which this suit was commenced, reads as follows:

"'It is further directed, ordered, and decreed that said Chester L. Collins, receiver as aforesaid, do, and he is hereby, ordered and commanded, after said assessment shall have been made as above directed, to notify the policy holders of said company, being the members of said company, and each of them, of the amount of the assessment against such member and make a demand therefor, and proceed to the collection of the amount assessed against each of said members of said company for the amount so assessed with all possible dispatch, and if the member or members of said company shall fail or refuse to pay the amount of his, her or their assessment within thirty days after the mailing of such notice and demand of said receiver, he shall thereupon proceed to collect from such member or members the whole amount of each member's liability under the policy issued to said members respectively. Said receiver is hereby authorized and directed to resort to such legal measures and proceedings as may be necessary for that purpose.'

"The said Chester L. Collins resigned as receiver and was discharged, and on the 16th day of December, 1905, Frank S. Pratt was by an order of the circuit court for

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the county of Bay, in chancery, duly appointed receiver of the said Michigan Manufacturers' Mutual Fire Insurance Company, and duly qualified, and at the time this suit was commenced was and still is acting as receiver of said company.

"The defendant, William M. Broadwell, became a member of the Michigan Manufacturers' Mutual Fire Insurance Company on the 6th day of June, 1899, and policy No. 1,890 was issued to him. Said policy was a Michigan standard policy, containing a mutual clause, a copy of which is hereto annexed, marked 'Exhibit B' and made a part of this stipulation. Said policy was canceled on the 7th day of December, 1900, at which time the defendant withdrew from said company, paid to said company the sum of $10.46, it being all claims at that time made upon the defendant, and severed his connection with said company. The amount sought to be recovered in this suit represents the amount assessed against the defendant for losses which accrued from the time the defendant became a member of said company until he withdrew and his policy was canceled. Schedule of losses is hereto attached, marked 'Exhibit C' and made a part of this stipulation.

"On the 29th day of August, 1901, a notice of the assessment levied against this defendant was duly mailed to him, which notice was received by the defendant and is hereto attached, marked, 'Exhibit D' and made a part of this stipulation. Payment of the sight draft mentioned in said notice of assessment was refused by said defendant.

"This cause was commenced in justice's court by summons issued on the 26th day of September, A. D. 1907. The summons was personally served on the defendant on the 27th day of September, A. D. 1907.

"It is further stipulated that, if plaintiff is entitled to recover at all in this action, the judgment should be for the sum of $44.48, with interest at the rate of 5% per annum from the 6th day of December, 1907, with costs. The pleadings in justice's court were in writing, and are hereby made a part of this stipulation."

The material part of Exhibit A, referred to in the stipulated facts, is as follows:

"All assessments shall be made *pro rata* upon all the

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deposit notes owned by the company. Notice of such assessment shall be sent by mail, to each member, and if any member shall fail to pay such assessment within thirty days from the receipt of such notice, or within thirty days from the mailing of such notice, addressed postpaid, to his last postoffice address, judgment may be taken for the full amount of such notes, but execution shall not issue, except for the amount of assessment regularly levied."

There is but one disputed question of law. The defendant claims that the debt or demand sued upon is barred by the statute of limitations. The plaintiff urges the contrary.

It is apparent that the notice of the assessment, made by the receiver, under order of the court, was mailed August 29, 1901, and that suit for the collection of said assessment was not commenced until September 26, 1907.

Plaintiff claims that he had until September 29, 1907, to start suit, by reason of the fact that the order of the court, under which the assessment was made, provided that "if the member or members of said company shall fail or refuse to pay the amount of his, her or their assessment, within thirty days after the mailing of such notice and demand of said receiver, he shall thereupon proceed to collect," etc. He also points to the provision in section 10 of the articles of association to the same effect, and argues from both of these provisions that, although notice of the assessment was mailed on August 29, 1901, the assessment was not due and payable until 30 days after that date, and therefore that the statute did not commence to run until September 29, 1901.

We are unable to agree with plaintiff's contention. While it is true that, both in the order of the court and in section 10, it is provided that suit shall be brought *after* the expiration of 30 days from the date of the mailing of the notice, there is nothing in the language of either, which indicates that the assessment was not *due* the moment notice thereof was mailed. Indeed, this is apparently the

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construction entertained by the receiver, the officer of the court, for, at the time he mailed the notice of assessment, he attached thereto a sight draft for the amount thereof. In any event, we are of opinion that the case is ruled by decisions of this court.

In the case of *Wardle* v. *Hudson*, 96 Mich. 432 (55 N. W. 992), the assessment was made on May 25, 1885. It became due and payable, for some reason not pointed out in the opinion, July 15, 1885. Suit was commenced thereon February 24, 1892. This was more than six years after the last above-named date, and the claim was held to be barred by the statute. Whether it would have been barred had it been commenced less than six years after July 15, 1885, but more than six years after May 25, 1885, is not, in terms, determined by this case as it was not necessary. The language of the decision, however, and the authorities cited, seem to indicate that it would have been so held, had that question been in issue. At page 436 the court says:

"The rule seems to be well settled that the statute of limitations does not begin to run on a deposit note, given by a member of a mutual insurance company, whereby he agrees to pay a sum certain, or any part thereof, when required, and which by its terms is part of the absolute funds of the company, *until an assessment is laid.* In the present case, *the assessment had been made* more than six years prior to suit brought."

Again, in *Peake* v. *Fuller*, 123 Mich. 684 (82 N. W. 847), the court said: "The statute did not begin to run *until the time the assessment was made*"—holding the question to be controlled by *Wardle* v. *Hudson*, *supra*. In both of these cases, the case of *Smith* v. *Bell*, 107 Pa. 352, is cited and relied upon. There, the court held:

"A sufficient answer to the plea of the statute of limitations is that the note was not payable at once, or on demand, but is payable by installments, upon the happening of a loss and assessment therefor; and so, *until an assessment is made*, the statute does not begin to run"—citing several cases.

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We think a fair complement to the statement "The statute did not begin to run until the time the assessment was made" is, from that time, it did commence to run.

The judgment is affirmed, with costs.

BLAIR, C. J., and HOOKER, MOORE, and MCALVAY, JJ., concurred.

WEIDMAN *v.* PHILLIPS.

1. SALES—FRAUD—INTENT NOT TO PAY PRICE.
   That the purchasers of lumber represented it was a cash deal, but did not pay for the merchandise, and were hopelessly insolvent, that the lumber was immediately turned over to a creditor of the purchaser, at a price lower than cost, and that the purchaser had no reasonable expectation of being able to pay, tends to show a fraudulent intent which gives the seller a right to rescind and recover the property.

2. SAME—FRAUD—RESCISSION—INSTRUCTIONS TO JURY.
   A charge to the jury that to constitute fraud the buyer must have had no reasonable expectation of being able to pay the price within the lifetime of the account, is not error and is unduly favorable to the defendants when coupled with further instructions that an intention not to pay, or to cheat and defraud the owner, must have existed.

3. SAME—TRIAL—INSTRUCTIONS TO JURY—REQUESTS.
   It was not error for the trial court to refuse a request to instruct the jury that the defendants' contention was correct, and that if they, in good faith, intended to continue in business, such intention would legally rebut any inference that they did not intend to pay for the lumber.

4. SAME—MATURITY OF ACCOUNT.
   Under a contract of sale providing that the purchaser should have "two per cent. off within ten days" or "two per cent.

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off net bill for cash on arrival of car" the question of the time when the account matured, was not a question of fact for the jury.

Error to Saginaw; Gage (Chauncey H.), J. Submitted November 19, 1909. (Docket No. 96.) Decided December 30, 1909.

Replevin by John S. Weidman against John T. Phillips and Arthur W. Seeley, copartners as Phillips & Seeley. A judgment for plaintiff is reviewed by defendants on writ of error. Affirmed.

Davitt & Davitt, for appellants.

Beach, O'Keefe & Rockwith (*Frank McNamara*, of counsel), for appellee.

HOOKER, J. The defendants have appealed from a judgment against them, based on an alleged wrongful conversion of certain lumber.

The plaintiff owned and operated a sawmill and lumbering business at Weidman, Isabella county, Mich. The Ross Bros., consisting of William and Ronald Ross, were engaged in a similar business at Beaverton, Gladwin county. Defendants are lumber dealers, with offices at Saginaw. The plaintiff's claim is based on the following testimony, which we find it necessary to give somewhat at length, in order that the case be well understood. The plaintiff testified that on the 23d day of October, A. D. 1907, his bookkeeper, one Green, informed him that he (Green) had had a telephone communication from Ross Bros., who were at the time dealers in lumber at Beaverton, Gladwin county, Mich.; that Mr. Green's talk with Ross Bros. took place about 3:30 p. m., and that about 5:30 o'clock p. m. the plaintiff called up Ross Bros. by telephone, and talked with William Ross, one of the firm.

"*Q.* Now, the talk between yourself and Ross Bros.—state what talk you had with him.

"*A.* Well, I called Ross at 5:30, I think, and he asked

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me some questions about hemlock—if we had some dry hemlock—and I told him we had. He said he had some nice hemlock orders he could not fill, and he wanted to know if I could fill them. He gave me the different kinds of lumber he wanted, and I told him we could fill them. 'Now,' he says, 'I want spot cash price on this bill stuff, your lowest cash price,' because, he says, 'This is a cash deal.' He said he had been figuring on coming over to see me. He said we had been neighbors for years and doing business pretty close, and never seen each other, and he was often thinking of coming over to see us, but he hadn't time, so he called me up to see if we had this stuff. He said: 'I want you to make this just as close as you can, because it is a spot cash price.' So he gave me the stuff over the telephone, and he said he would confirm that the next day by the order. He sent the order over, and we commenced shipping the lumber out to different points."

Referring to those orders, on cross-examination, plaintiff testified:

"*Q.* What did he say the orders were?

"*A.* Hemlock boards and bill stuff. Also that bill stuff is lumber; that is, two inches thick. 'Now,' he says, 'I want your spot cash price on this lumber, your best prices on this lumber, for this is spot cash.'

"*Q.* What more was said, if anything?

"*A.* Nothing more; only it was to be spot cash on arrival of car; to be spot cash.

"*Q.* That was his suggestion?

"*A.* And I turned around to Mr. Green, and said: 'That is the kind of men we want to deal with; they are cash fellows.'

"*Q.* Well, what was said? I am asking you to give me a statement, if anything was said in the conversation about bill stuff, in connection with your spot cash price.

"*A.* Why, he gave me a bill. He told me what he wanted. He wanted this bill stuff and boards, but he wanted a spot cash price on both bill stuff and boards; that is, what he shipped him. Also, that this was the only talk he had with Ross Bros. with reference to the sale of this lumber, and it was the first business and the first conversation he ever had with them."

Plaintiff then put in evidence a letter he received from

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Ross Bros., which was marked Exhibit M, and reads as follows:

"BEAVERTON, MICHIGAN, 10-23-07.
"Mr. JOHN S. WEIDMAN,
"Weidman, Michigan.

"*Dear Sir:* Please find inclosed confirmation of 6 car loads lumber as per conversation by telephone today. You will please send us the invoices and shipping bills here to Beaverton, and do the best you can as to price less 2 per cent. 10 days from shipment. Perhaps we will need some more lumber, if so will let you know the first of next week.

"Thanking you, we are,
"Yours very truly,
"ROSS BROTHERS.

"P. S. Kindly acknowledge receipt of these orders and advise about how soon you will be able to ship same, and oblige,

"Yours truly,
"ROSS BROS."

Inclosed with Exhibit M were orders for 6 cars of lumber, two of which were returned unfilled. The orders that were filled were put in evidence, and numbered Exhibits 4, 5, 6, and 7. But no part of that lumber came into the hands of the defendants, and recovery against them therefor was not sought.

Plaintiff also put in evidence the following letter to him from Ross Bros., which was marked Exhibit N, and reads as follows:

"BEAVERTON, MICHIGAN—10—26—07.
"Mr. JOHN WEIDMAN,
"Weidman, Mich.

"*Dear Sir:* We inclose you herewith three orders for lumber to be shipped rough to Ross Brothers, Saginaw, Mich., which, we hope, you will be able to get out soon; of course Gondola cars are scarce now on account of sugar beets, but these orders can be loaded on flat cars, as they are small loads and are to be shipped only to Saginaw. Please acknowledge receipt of these orders and about how soon you will make shipment, and oblige,

"Yours very truly,
"ROSS BROTHERS.

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"P. S. Please send us the shipping bill and invoice as soon as cars are loaded so we can have these cars taken care of as soon as they reach Saginaw."

Plaintiff also gave evidence tending to show that these orders were filled as directed, and put in evidence the shipping bills. Plaintiff also gave evidence tending to show that the lumber described in Exhibits A, B, and C was shipped according to orders, and after its arrival in Saginaw was transferred by Ross Bros. to the defendants, Phillips & Seeley. And, further, that Ross Bros. did not pay the plaintiff any part of the purchase price of said lumber. Neither did the defendants, Phillips & Seeley, pay Ross Bros. any present consideration, but they were given credit on notes that were made and discounted at the bank, which were taken up by Phillips & Seeley, which notes were all made and discounted at the bank prior to the purchasing of the lumber from the plaintiff in this suit. Evidence was given tending to show the value of lumber shipped by the plaintiff on those orders; that that lumber came into the hands of the defendants, and that it was worth the amount specified in Exhibts A, B, and C, to wit, $906.87, and further, that the plaintiff first learned that this lumber came into the hands of the defendants about November 30, 1907.

Plaintiff also gave testimony tending to show that, in addition to the lumber which so came into defendants' hands, Ross Bros. ordered of plaintiff, and he shipped accordingly, at intervals between November 2, and November 16, 1907, inclusive, other lumber, which went into the hands of persons other than defendants, of the value of $2,846.19. That that lumber was shipped according to Ross Bros.' orders, on shipping bills containing the same terms and conditions as Exhibits A, B, and C. The shipping bills of this lumber were marked Exhibits D, E, F, G, H, I, J, and K. When these were offered in evidence, counsel for defendants objected, on the ground that they were not material, which objection was overruled and exception duly taken.

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"*Judge Beach:* Why, if the court please, this is lumber that was shipped to Ross Bros. under the arrangement that was had over the telephone. Now, the whole transaction that they had with them with reference to their dealing is perfectly competent here for the purpose of showing the condition that Ross Bros. was in at the time.

"*The Court:* If I understand you right, the telephone conversation related, not only to this particular lot of lumber, but referred to other lots of lumber, too?

"*Judge Beach:* Yes, sir.

"*The Court:* And what you desire to show is that Mr. Weidman fulfilled his part by shipping all of the order to somebody?

"*Judge Beach:* To Ross Bros.; yes.

"*The Court:* And that none was paid for?

"*Judge Beach:* None of it was paid for."

Plaintiff, in company with his attorneys, Frank Dodds and John F. O'Keefe, before commencement of this suit, went to the office of Phillips & Seeley, in the city of Saginaw, and demanded the lumber, and offered to pay the defendants any money that they had paid for freight, and asked him how much money he had paid. Defendant refused to state to him how much he had paid, and said he would not accept it anyway, and when demand was made for the lumber, he then stated that he didn't have it, and wouldn't pay for it unless he was compelled to, and gave his reason because Ross Bros. owed him a great deal of money.

To further maintain the issue on his part, plaintiff offered evidence tending to show that on the 2d of December, 1907, an involuntary petition in bankruptcy was filed in the United States district court for the eastern district of Michigan, northern division, against Ross Bros. as a firm and as individuals; that on December 27th they were adjudicated bankrupts, and a receiver of their property appointed, and that on January 17, 1908, a trustee was appointed, Miles J. Purcell, Esq., of Saginaw, being appointed receiver, and later trustee, and that he as such had taken possession of the property and assets of Ross Bros.

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It was also shown that Ross Bros. were deeply in debt to defendants; that the lumber was sent to them to apply on their debt, at the price of $15.50 per M. ft., which was $3 per M ft. less than price charged Ross Bros. by plaintiff. It was plaintiff's claim that the purchase by Ross Bros. was fraudulent, and gave him the right to rescind, which he claims that he did, as hereinbefore stated, as soon as he ascertained that the purchase was fraudulent.

This cause is much like *Skinner* v. *Hoop Co.*, 119 Mich. 467 (78 N. W. 547, 75 Am. St. Rep. 413). There, as here, one alleged to be insolvent bought property, and sold it to others. There, as here, he promised to pay for it at once, and did not. There we held that, under the facts shown, the cause should have gone to the jury to determine whether the purchaser had at the time a preconceived intention not to pay, or no reasonable expectation of being able to do so. In the present cause there was abundant proof of insolvency, and the situation was such that a juror might legitimately find that the purchaser had no reasonable expectation of being able to pay, even if it should be thought that he may have had any such expectation. It follows that the court did not err in refusing to direct a verdict for defendants, if the case must turn on the question of fraud.

Counsel say that "Ross Bros. may be censurable for not knowing that their efforts to pull the business through and prevent an ultimate wreck were hopeless, but such conduct on their part was not fraudulent;" and that, "Concealing their insolvent condition, if they were insolvent and concealed it, was not such fraudulent conduct as would warrant rescinding the sale." This all depends on the circumstances. It cannot be said that a party may continue to try to keep his business going by buying goods on credit to pay overdue obligations with, under any and all circumstances, and not be guilty of fraud, for the expectation of successfully weathering the storm may be such a forlorn hope as to exclude all reasonable expectation, and then such a purchase as this is fraudulent. We

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think counsel are wrong in saying that there was no evidence that Ross Bros. did not intend to pay, except their possible inability to pay. The circumstances of their insolvency and its degree of hopelessness, their own knowledge of such circumstances, the immediate transfer of the lumber at a loss, are all circumstances which bear upon the question one way or the other, and it is for the jury to say, viewing the purchase in the light of all of them, whether they did expect to pay, or whether they had no such reasonable expectations.

Error is assigned upon the following charge:

"For the purposes of this case, if a party is insolvent or in failing circumstances—one or the other, or both—at the time he purchases property, and has no reasonable expectation of receiving money from some source that he has a right to receive it from to meet the obligations, and does not intend to pay for it, under such circumstances the buyer would have a right to rescind the contract, and take the property into his own possession and treat the sale as void, although he may have delivered the property to the buyer. Insolvency alone is not sufficient. It is not the law that because a man is insolvent he cannot do business. It sometimes occurs that a man may be insolvent, yet he may be doing business while in a state of insolvency—that is, his assets may be less than his liabilities—and yet he may continue business and continue the struggle to maintain himself and his credit and his business; and from the very fact that he continues with the struggle, and finally he emerges from it successfully, it is not the law that because a man is insolvent he must lie down and do nothing, so that that (insolvency) alone is not sufficient to warrant the seller in rescinding a contract of this character; but this is an important circumstance to be taken into consideration by the jury relative to other facts that are necessary to be found by the jury, before a sale can lawfully be rescinded. Those other facts must be these in addition to insolvency. He must have at the time he makes the order no reasonable expectation of receiving money to pay for the goods so purchased within the lifetime of the account. He must also have no reasonable expectation of receiving it. That additional circumstance must appear; and then in addition to that—that this is the central or main purpose of the law—he

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must at that time have in his own mind that intention not to pay for it; in other words, to cheat and defraud the owner of the property."

It is said that this indicated to the jury that they might base fraud upon a finding that the purchaser had no reasonable expectation of being able to pay during the lifetime of the account. But this is not so, for in the next few lines he speaks of what he calls the "central fact," viz., "an intention not to pay," and he adds, "in other words, to cheat and defraud the owner of the property."

It is urged also that the charge was too restrictive, in that it states that a right to rescind would exist if an insolvent had no reasonable expectation of receiving money from some source that he has a right to receive it from, to meet the obligations, *and does not intend to pay for it.* It is said that the implication is that, unless they had a reasonable expectation of getting the money so that they could pay at maturity, there would be a right to rescind, and that this excluded the possible receipt of money from a prospective sale of land regarding which negotiations were pending.

We are of the opinion that there is no such implication as that mentioned, and that the language is broad enough to give the jury to understand that a reasonable expectation of getting money from any source was contemplated. But, further, the learned circuit judge coupled with this want of expectation to receive money the want of intention to pay for it (*i. e.*, the lumber) which, in another place in the same portion of the charge, he calls the "central or main purpose of the law" an intention not to pay—*i. e.*, an "intent to cheat and defraud the owner of the property"—and he couples them again in his recapitulation on page 74 of the record. This was a more favorable instruction than was necessary, as it in each instance coupled an actual intention to cheat with the absence of expectation to be able to pay, while the former would be sufficient ground for rescission without the latter.

Our attention is challenged to several of defendants' re-

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quests to charge. Of these we may say that they were in the main covered by the charge, and the judge so told counsel, who thereupon made some suggestions, to which the court acceded. Particular stress is given on an alleged failure to give requests VII and A–8. VII was given in substance, while we think A–8 was properly refused.

Upon this record the court did not err in failing to submit to the jury the time when payment was due.

We have endeavored to make a critical examination of each point raised, and have found no error.

The judgment is affirmed.

BLAIR, C. J., and MOORE, MCALVAY, and BROOKE, JJ., concurred.

BREEN v. BREEN.

DIVORCE — ALIMONY AND EXPENSE MONEY — APPEAL AND ERROR.

An allowance may be made by the Supreme Court for solicitors' fees and expenses in an appeal from a decree refusing complainant a divorce, after the filing of a claim of appeal, although the testimony has not been settled or the return made. Act No. 299, Pub. Acts 1909.

Bill by Adelia M. Breen against William J. Breen for a divorce: On motion of complainant for an allowance of alimony for the purpose of defraying the expense of appealing from a decree dismissing the bill. Submitted December 14, 1909. (Calendar No. 23,795.) Motion granted December 30, 1909.

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C. G. Turner, for the motion.

Clapperton & Owen, contra.

MONTGOMERY, J. This is an application for an allowance of alimony. It appears that the case has proceeded to a decree in the court below and a claim of appeal to this court has been filed with the register of the court, and a showing is now made for the purpose of securing an allowance for a transcript of the stenographer's report of the testimony, for printing the brief, services of counsel, registry fee, etc.

It is objected by the defendant that this court has no jurisdiction of the case for the purpose of allowing this motion. The statute authorizing appeal (Act No. 299, Pub. Acts 1909, § 2) provides:

"Any party desiring to appeal from the order or decree of the circuit court in chancery shall, within forty days after the entry of such order or decree, or, in cases where the cause is heard upon proofs and pleadings taken in open court, or before a circuit court commissioner, or by deposition, then within forty days after the settlement of the case upon such appeal, file or cause to be filed a claim of appeal in writing with the register of the court where such decree or order was entered, and shall also within the said forty days pay a fee of five dollars to the register in chancery."

It is contended that until the case is settled it may not be appealed to this court.

Under a statute entirely similar (2 How. Stat. § 6647), it was held that, although the time for taking an appeal begins to run from the settlement of the case, the fact that the appeal was taken prior to the settlement of the case is not necessarily a ground for the dismissal of the appeal. *Simons* v. *Simons*, 47 Mich. 645 (10 N. W. 360). And in *Van Voorhis* v. *Van Voorhis*, 90 Mich. 276 (51 N. W. 281), we entertained jurisdiction to grant alimony in a case in which there had been no settlement of the testimony so far as the record discloses.

The showing before us is that the complainant is occu-

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pying a homestead owned by the parties; that she is receiving $18 a month rental for the lower story and living in the second story; that, in addition to this, the defendant is furnishing her an allowance of $35 a month, and the petitioner does not ask for any allowance for her own support. She does ask for $1,186, which consists of an estimated expense of $540 for the transcript of the record and for printing the same and printing the brief, $11 for clerk's and register's fees, and $635 for counsel's services and expenses. In a case in which the complainant has had a hearing in the circuit and been denied relief, there is no such presumption that she is entitled to maintain a bill of this character as to justify an extravagant allowance of counsel's fees for the preparation and submission of the case. The same counsel is engaged who was employed in the court below. Presumably he is familiar with the testimony, and it is not believed that at any reasonable per diem his services will amount to the sum stated for preparing and submitting this case.

We limit the allowance of counsel's fees to $200, and, as to any further allowance for services, the parties must be content to await a determination at the hearing. In addition to this, there will be an allowance of $200 for the transcript to be paid within ten days, $300 for the printing of the record, or, in lieu thereof, the defendant is at liberty himself to secure the printing of the record, $40 for printing the brief, and $11 to cover the register's fee and the fee of the clerk of this court, making a total allowance of $751.

OSTRANDER, HOOKER, MOORE, and MCALVAY, JJ., concurred.

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MURPHY *v.* MONTMORENCY CIRCUIT JUDGE.

MANDAMUS—PUBLIC OFFICERS—ELECTIONS—INJUNCTION.

The issuance of a temporary injunction restraining a claimant to the office of township clerk from interfering with the officer in possession, and holding over under a claim of right after an alleged tie vote at the election, is not such an improper exercise of discretion that the writ will be dissolved by mandamus.

Mandamus by William W. Murphy to compel Frank Emerick, circuit judge of Montmorency county, to dissolve a temporary injunction. Submitted December 14, 1909. (Calendar No. 23,504.) Writ denied December 30, 1909.

O'Brien & Francis, for relator.

Charles R. Henry, for respondent.

OSTRANDER, J. The return of the circuit judge to the order to show cause contains a statement of facts, not traversed, sufficient for the purposes of decision. Upon the authority of *Stenglein* v. *Saginaw Circuit Judge*, 128 Mich. 440 (87 N. W. 449), and *Blain* v. *Chippewa Circuit Judge*, 145 Mich. 59 (108 N. W. 440), we decline to interfere by mandamus to compel the dissolution of the injunction.

"At the annual township meeting held in the township of Hillman, in said county, on Monday, April 5, 1909, relator and said McNichol were opposing candidates for the office of township clerk. There was only one ticket for the several township offices printed upon the official ballot at such election, and McNichol was the candidate thereon, while relator was running as a slip candidate.

"At the close of the polls on the afternoon of April 5th the inspectors counted the ballots cast for township officers, and found the number to be 141, which agreed with

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the number of electors voting for township officers as shown by the poll list and tally sheets. The board then canvassed the votes cast for each of said township offices, and, after rejecting imperfectly marked and illegal ballots, found, determined, and declared that, for the office of township clerk, relator and said McNichol had each received 64 votes, and that the result of the ballots for that office was a tie. Thereupon said board adjourned until the next day.

"On April 6th the board of election inspectors reconvened, and made out and signed in duplicate a statement of the number of votes cast for the several candidates for township offices, and the names of the persons elected thereto, and also showing that, for the office of clerk, the result was a tie between relator and said McNichol, which duplicate statements were then sent, one to the chairman of the board of county canvassers, and one, with the original tally sheets, to the county clerk. The board then proceeded to open the box containing the ballots for State officers and count the same. The electors of this township at this election had also voted, upon a small separate ballot, upon the question of the establishment of a county normal institute. No separate box had been provided for receiving the ballots upon this question, but the same had been deposited in the State box.

"In counting the votes upon this question, there was found, rolled up inside of a ballot on the normal question, a township ticket upon which the elector had voted for relator for clerk. Relator at once made claim to the board that such ballot should be counted as a vote for him. McNichol disputed this claim, and asserted his own election upon the ballots already counted which the board had decided showed a tie. The board were in doubt upon their right to count this ballot, but marked and preserved the same. Relator then asked the board to 'give him the time which the law required' to look up the law upon the matter. No formal action was taken upon this request, but it was, at least tacitly, understood by the members of the board that time should be given relator to ascertain his right to have such ballot counted for himself. No definite time for such purpose was either fixed upon or mentioned. While McNichol was present at this time, it is a disputed question whether he made public opposition. Formally, and upon their record, the board of election inspectors adjourned without day. Upon Wednesday,

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April 7th, the township board met and allowed and paid the bills of the members of the board of election inspectors for their services. Upon Friday, April 9th, the members of the board of election inspectors came together and demanded of McNichol the box containing the township ballots. Mr. McNichol had possession of such box because of his appointment on March 29, 1909, as township clerk, by the township board, under section 2328, 1 Comp. Laws. This section is as follows:

"'SECTION 2328. Whenever there shall be a vacancy, * * * in either of the township offices, except that of justice of the peace and township treasurer, the township board may make temporary appointments of suitable persons to discharge the duties of such offices respectively; and such persons, so appointed, shall take the oath of office, or file the notice of acceptance required by law, and shall continue to discharge such duties until the office is filled by election or until the disability aforesaid be removed.'

"At this time there was an entire vacancy in the office of clerk of Hillman township by reason of the removal of the clerk, Mr. George J. Crawford, from the State, and the resignation of L. W. Ostrander, his deputy. The resolution appointing Mr. McNichol as township clerk is as follows:

"'HILLMAN, MICHIGAN, March 29, 1909.

"'At a township board meeting held in the clerk's office in the township of Hillman, Montmorency county, Michigan, on the above date. Meeting was called to order by the chairman of said board. Roll called and the following officers were present: Supervisor, Robert Rea; Justices, H. Stevens and John H. Gohl. Moved by H. Stevens and supported by John Gohl that George A. McNichol be appointed as deputy clerk for the office of clerk for the township of Hillman until there is one elected and qualified. All voting in favor, motion carried.'

"Under such appointment Mr. McNichol had performed all the duties of township clerk, including the keeping of records, signing of orders, and filing of mortgages, both before and after election up to said 9th day of April. Upon said April 9th, upon the members of the board of election inspectors asking Mr. McNichol for the box of township ballots for the purpose of recounting the same, he protested against any such action, and made the claim that it was then too late to recount the ballots or take further action in the matter; that if he had not been himself

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elected, then there had been no election, and he would hold over under his appointment. Nevertheless the board did recount the township ballots. They first took the township ticket found on April 6th, in the State box, upon which relator's name appeared for clerk, and put it with the other ballots. And as this made 142, or one more than the number of electors voting for township officers, as shown by the poll and tally sheets, after mixing the ballots, they proceeded to draw out one. The ballot so drawn out was one for McNichol. The board then proceeded to recount the remaining ballots for clerk. And the result was again a tie. The board then informed relator and McNichol they must draw lots for the office of clerk. Mr. McNichol again refused to participate in these latter proceedings for the same reason as before, and again asserted his own election, or if that be found wanting, then no election had been had, and his own incumbency by reason of holding over under his appointment. The board then, upon Mr. McNichol's refusal to draw lots for the office, themselves drew for relator and Mr. McNichol, and the choice came to relator. The board then sent the following notice:

"'HILLMAN, MICHIGAN, April 9th, 1909.

"'COUNTY CLERK OF MONTMORENCY COUNTY.

"'*Dear Sir:* The tie between William W. Murphy and George A. McNichol was decided by the election board in favor of William W. Murphy.

"'Respectfully yours,

"'WILLIAM H. DRAPER,

"'JOHN H. GOHL,

"'GEORGE B. GOHL,

"'BYRON WIXSON,

"'DANIEL DE GEER,

"'Inspectors.'

"Thereupon relator filed his oath of office, and on April 10th his bond was approved by the township board. On the morning of Saturday, April 10th, the township board held a meeting in the village of Hillman. This meeting was held in the office of one Gorman, and not in the office of the township clerk in the town hall. This was because Mr. McNichol, who was then publicly, notoriously, and to the knowledge of the relator and the township board claiming to be township clerk, and to be in possession of such office, had gone to Alpena to take legal steps to pro-

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tect himself in such possession, and had taken the keys to the office of the township clerk with him. Mr. Harry Stevens, a member of the township board, and a defendant in the chancery suit, testified:

"'That at 12 o'clock of that day (April 10th) relator showed me that the door of the clerk's office had been broken in and the lock smashed.'

"Thereupon said Stevens procured a new lock, at the instance of the board, and placed it on the door, and the supervisor gave the key to relator. Relator says he does not know who broke in the door, but I believe it was done in his interest and by some of his partisans. The combination lock on the clerk's safe in this office had been out of order and not used for some time before this, and relator says he found the inner doors of the safe unlocked, and in this way took possession of the books, papers, and records. Mr. McNichol says that, when he went away in the morning, he left such inner doors securely locked and took the keys with him. I believe if, when relator secured entrance to this office in the manner aforesaid, he found the doors of the safe open, the same had been opened in some manner by the same person or persons who broke open the door of the office. But it was sworn by Mr. McNichol and practically admitted by relator that on Sunday afternoon, April 11th, relator had asked him [McNichol] for the keys to the safe, and on being refused said he would have to break the safe doors, if McNichol did not give him the keys. Mr. McNichol did not succeed in obtaining the fiat for an injunction upon his bill filed herein upon Saturday, April 10th, but did on Monday, April 12th, and on Tuesday, April 13th, such injunction was duly served upon relator and the other defendants. On April 12th Mr. McNichol took and filed his oath of office and also filed with the township board a bond in the sum of $1,000, with sureties whom the supervisor testified were perfectly good. On Wednesday, April 14th, Mr. McNichol went to the clerk's office with some chattel mortgages which had been placed in his hands as clerk for filing, and attempted to file the same and enter them on the proper books. Relator by force ejected him from the office. From that time on relator utterly refused to recognize such injunction, and openly and defiantly disobeyed the same. Upon cause shown, an order issued requiring relator to show cause at the last May term of court why

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he should not be punished for a violation of such injunction. A hearing was had upon relator's answer to such petition, and testimony taken at considerable length in open court.

"Upon the conclusion of such hearing, and the arguments of counsel, I did adjudge and determine that relator was guilty of the violation of said injunction, and was in contempt of court therefor; but I deferred the imposition of any penalty thereon until the next term of court, because, at the request of both counsel, I had deferred said arguments until after the final adjournment of said May term. The condensation of, and conclusions from, certain testimony attached to relator's petition for mandamus herein, are taken from a small part of such testimony so taken upon such application to punish for contempt. The relator never moved to dissolve such injunction until after he had been so cited for contempt in disobeying the same. The foregoing statement of the facts, and of all the material facts, as I view them, are my findings and conclusions from the bill of complaint and all of the testimony taken at said hearing.

"I further find that relator now, as sworn by himself, has no keys to any of the doors of the safe, but the same are still in the possession of McNichol. The case made by the bill, in my judgment at the time, presented the case of a *de facto* officer seeking the aid of the court in protecting himself, in his incumbency of an office, against violent and forcible dispossession, and from door and lock breakers. When this injunction issued, in my opinion and belief, complainant was still in possession of the books, papers, and records of the office, and had the same locked in the office safe. He had been dispossessed of the mere room in which the business of the office had been carried on, so far as a mere trespass can effect dispossession. But—

"'Certainly the question of who is really the *de facto* officer cannot depend alone upon the ability of one to forcibly exclude an officer from his place of business, and while holding him out by force perform its duties to the extent of doing such business as is presented.' *Blain* v. *Chippewa Circuit Judge*, 145 Mich. 59, 66 (108 N. W. 440).

"And the testimony subsequently taken in the contempt proceedings has only strengthened my first opinion.

"The case presented by the bill justified the issuing of

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the injunction in the first instance, and hence there was no lack of jurisdiction which would justify relator in ignoring and violating it. And the facts subsequently developed amply sustained maintaining the writ until the rights of the parties could be settled in an orderly manner in a proper suit at law, where alone the title to this office can be tried and determined. And to that end, and for that purpose, it was expressly provided in the order, overruling the motion of relator to dissolve, that such trial at law should be had at once, and without the usual or any delay whatever. Such order was only made upon such terms, namely:

" 'But upon this condition, that, if said defendant Murphy elects to file an information in the nature of *quo warranto* to test the title to the office of clerk of Hillman township, the complainant plead issuably thereto instanter, and thereafter join issue with the relator upon the merits on or before July 5, 1909. And, further, that upon such issues being joined as aforesaid the said complainant stipulate in writing to try the issues of fact and law so joined, upon the preference of said relator, either in the county of Alpena or in the county of Montmorency, out of term time, on or before the 20th day of July next, and to abide by and perform the judgment of the court thereon.' "

Writ denied, with costs to the complainant in the chancery suit.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

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MICHIGAN UNITED RAILWAYS CO. v. KALAMAZOO CIRCUIT JUDGE.

MANDAMUS—INJUNCTION—STREET RAILWAYS—INTERURBAN CARS IN CITIES.

On mandamus to compel a circuit judge to dissolve a temporary injunction restraining a street railway company from operating interurban cars on the street railway tracks in the city of Kalamazoo, under a franchise that the company claimed authorized such user, the right to a final restraining order not being clear, and the public sustaining no injury from continued operation of the car, the injunction is ordered dissolved.

Mandamus by the Michigan United Railways Company to compel Frank E. Knappen, circuit judge of Kalamazoo county, to dissolve an injunction. Submitted November 16, 1909. (Calendar No. 23,675.) Writ granted December 30, 1909.

Sanford W. Ladd (*Alfred J. Mills*, of counsel), for relator.

William L. Fitzgerald, for respondent.

OSTRANDER, J. The city of Kalamazoo on October 16, 1909, filed its bill of complaint in the circuit court, in chancery, for Kalamazoo county, against the Michigan United Railways Company, and prayed:

"That a temporary injunction may issue from this court, ordering and directing the said Michigan United Railways Company, its successors, agents, servants, motormen, conductors, and employés, to refrain from operating interurban cars from and off its interurban railroad onto the street railway tracks on Washington avenue and Portage street, in the city of Kalamazoo, and to desist and refrain from turning, reversing, and switching said interurban cars at the intersection of Main street and Portage street in the city of Kalamazoo.

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"That it may be decreed by this court that the operation and running of interurban cars by the Michigan United Railways Company upon Washington avenue and Portage street, and the switching and turning and reversing of the same at the intersection of Portage street and Main street in the city of Kalamazoo, is unnecessary in the operation and management of the street car system operated and conducted by the said Michigan United Railways Company, under its franchise known as Ordinance No. 101, and the amendment thereto, in the city of Kalamazoo, and that the same constitute a nuisance.

"That the said Michigan United Railways Company, its officers, agents, servants, motormen, conductors, and employés, be perpetually enjoined and restrained from operating interurban cars from and off its interurban railroad onto the street railway tracks on Washington avenue, and Portage street, and from turning, reversing, and switching the same at the intersection of Portage and Main streets in the city of Kalamazoo, and that a permanent injunction may issue in the premises."

On the same day, without notice to defendant, an injunction was issued commanding the said defendant to—

"Absolutely desist and refrain from operating and running interurban cars from and off your interurban railway on the street railway tracks on Washington avenue and Portage street, in the city of Kalamazoo, and that you desist and refrain from turning, reversing, and switching said interurban cars at the intersection of Portage and Main streets in the city of Kalamazoo, until the further order of this court."

Thereafter the defendant answered the bill of complaint, and on or about November 1, 1909, moved the court upon the bill and answer to dissolve the injunction. The motion, coming on to be heard, was, by an order of court entered November 19, 1909, denied. Upon the petition of defendant this court issued its order to the circuit judge to show cause why the injunction should not be dissolved. An answer to the petition has been filed, no issues have been framed, and the cause stands for decision upon the petition and answer.

It appears that defendant is owner of the tracks and

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equipment of an electric railway operated in the streets of the city of Kalamazoo under an ordinance. It is owner, also, of the tracks and equipment by which it operates cars from Kalamazoo to Battle Creek and beyond. The defendant and its immediate assignor have operated cars from points without the city to points within the city, over and upon the streets mentioned in the injunction, and have turned or reversed the large interurban cars by means of a Y in the streets since May, 1900. It operates its cars beyond the city by virtue of franchises granted by the townships and cities through which its line of road extends. It is said on the part of the city that defendant has no right to operate cars from without the city in the streets of the city under the franchise referred to, and that therefore it has no right to operate such cars within the city. It is further contended that the use made of the streets in turning the cars constitutes a nuisance.

On the other hand, the defendant contends: That by the very force of its franchise rights in the city, and the statute, it has authority to operate its cars into the surrounding country; that the original ordinance and its amendments, fairly construed, give it the express consent of the city to do precisely what it and its assignor has for 10 years been doing; that in any event the city is estopped to deprive it in this manner of its use of its property installed without protest on the part of the city and used, as indicated, without objection. The writ, which was granted without considering the question of nusiance, operates to give to complainant all the rights which it seeks to secure by a final decree. It deprives the defendant of the use of its property and interferes with its established business as a common carrier of passengers. No bond appears to have been required of the city to indemnify the defendant. There is no exigency which demands the use of the temporary writ of injunction. It does not appear that complainant, or its citizens, will suffer if the cars are operated, as they have been, until such time as a

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final hearing and decree may be had. The learned circuit judge was of opinion that, inasmuch as it is admitted that defendant used the streets in the manner indicated, no questions of fact were involved, and the question of right is one of law properly presented upon the application for a temporary injunction.

We do not pass upon the merits of the controversy beyond this: The final right to the writ is not so clear that we should refuse to interfere. In this view of the case, the governing rule is a familiar one. We do not feel called upon to determine, no question of the proper remedy having been raised, whether the order granting the injunction is so far a final order that an appeal would lie. See *State Road Bridge Co.* v. *Saginaw Circuit Judge*, 143 Mich. 337 (106 N. W. 394); *Schmelzer* v. *Illuminating Co.*, 142 Mich. 133 (105 N. W. 129).

The writ of mandamus is granted, with costs against the city of Kalamazoo.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

THOMAN *v.* MILLS.

CORPORATIONS — ACCOUNTING — WRONGFUL SALE OF CORPORATE ASSETS—DAMAGES.

Where complainants, who were minority stockholders in an insolvent railroad company whose assets were sold by defendants to a corporation in which they were principal stockholders, without observing the due formalities of law, and without the consent of complainants, bring an action for an accounting, and for damages based on the wrongful sale, and, on the trial, it was shown that at the time of the trans-

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fer the liabilities of the railroad company, which were assumed by the purchaser as the consideration, largely exceeded the assets, and the sale was made in good faith, and the result would have been the same if the legal formalities had been observed, a judgment for nominal damages only will be affirmed. MCALVAY and MONTGOMERY, JJ., dissenting.

Appeal from Ingham; Wiest, J. Submitted November 18, 1908. (Docket No. 13.) Reargued October 11, 1909. Decided December 31, 1909.

Bill by Frederick Thoman and Jacob Stahl against Myron W. Mills and David Mills, executors of the last will and testament of Nelson Mills, deceased, and others, for an accounting. From a decree for complainants for nominal damages only, they appeal. Affirmed.

R. H. Person and *Black, Reasoner & Hayden*, for complainants.

Sanford W. Ladd (*Walbridge & Kelley*, of counsel), for defendants.

MOORE, J. This proceeding was commenced in April, 1905. The bill of complaint is filed to compel the defendants to account, as for a trust fund, for the assets and property of the Lansing, St. Johns & St. Louis Railway Company, which, it is claimed by complainants, they have attempted to secure for themselves, as officers and directors, and for all profits which accrued to the defendants by reason of their use of the property. The complainants were stockholders in the Lansing, St. Johns & St. Louis Railway Company, and it is claimed that their equitable rights in the property owned by that company have never been cut off by any proceeding authorized by law.

The important portions of the prayer for relief read:

"That the aforesaid Myron W. Mills and David Mills, executors of the estate of Nelson Mills, the said Myron W. Mills, James R. Elliott, and David Mills, and the said

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Lansing & Suburban Traction Company may be by the court required to account to your orators for the due value and proportion of the interest of your orators in the property as hereinbefore described of the said Lansing, St. Johns & St. Louis Railway Company, and for the profits, advantages, and benefits obtained as herein alleged."

The case was heard in open court. The circuit judge said (we quote from his opinion):

"I am satisfied that the defendants must account for the value of the stock held by the complainants in the Lansing, St. Johns & St. Louis Railway Company as of the date it was converted by way of resolution transferring the assets of that company to the defendants' company, the Lansing & Suburban Traction Co. Creditors of a corporation must proceed to have their claims satisfied in the usual way, and, if they occupy the dual position of creditors and majority stockholders, they must yet observe the rights of the minority stockholders when taking measures to satisfy their claims as creditors. The way adopted may have been a short cut to the inevitable result; but the law does not recognize such short cuts when it deprives any one interested of the right to have due process of law observed. I am not certain whether complainants are entitled to substantial damages, and the question of the amount, if any, they should recover from defendants, is left open for further argument by counsel and further determination by the court. The defendants, having received the assets of the Lansing, St. Johns & St. Louis Railway Company on the 3d day of March, 1904, must account for the value of the stock of the complainants in that company as of that day. * * * I say this now, to indicate that upon the reargument of the question of damages the stock held by complainants will be treated as converted on the 3d day of March, 1904, and the court will fix its value as of that day, and not follow it into other companies, and the question will have to be considered the same as any other conversion of specific property."

After the reargument the circuit judge expressed himself as follows:

"This court in an opinion filed February 21, 1907, held defendant guilty of the conversion of the complainants' stock in the Lansing, St. Johns & St. Louis Railway Company as of March 3d, 1904, and the matter now for deter-

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mination is the value of such stock on that date. To make this determination requires a consideration of the condition of the company on that date, what it had by way of tangible property and prospects capable of being depended upon, and what its obligations amounted to, and its ability to meet the same then or at any future date.

"Complainants insist the court, in determining the value of their stock, should consider the use made of the assets of the company by the defendants. An objection to this way of figuring value for complainants lies in the fact that the assets in defendants' hands could be used untrammeled by the indebtedness they were subject to, in the use the company could make of them. In the hands of the company, its property and prospects were so loaded down with its obligations that no substantial value can be placed upon them. They were worth, if anything at all over and above the obligations, only the amount that, under the most favorable circumstances, might have been realized out of their management by the company. The Lansing, St. Johns & St. Louis Railway Company had no funds, or any way to obtain funds. Its property was mortgaged for $500,000 for the construction of the road. It owed nearly $100,000 besides to the contractors for construction, and it owed other debts. Its contract for the construction of the road compelled it for lack of funds to practically give everything to the contractors. It could not meet its obligations. The bonus subscriptions fell flat. Its treasury was empty, and it is safe to say that no one could have been found willing to pay its obligations for all its property and prospects.

"Complainants had put in the venture in money about $300 each, and for that and their time and efforts had each received stock in the company of the par value of $7,300. I very much doubt, had there been an assessment of $50 on their holdings in February, 1904, whether either one of them would have put that sum into the venture, for, had the mortgage securing the bonds held by the contractors been foreclosed, the contractors would have had to bid the property in, for no bid could have been expected large enough to have paid the contract obligation. The best way I know to determine what the defendants took belonging to complainants is to determine what the complainants had of value in the company on the 3d day of March, 1904. These complainants, together with Frank L. Dodge, filed a bill of complaint against the Lansing,

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St. Johns & St. Louis Railway Company in March, 1902, asking this court to permit them to withhold the subscription stock from the company, on the ground, among others, that the company was insolvent. The company in its answer denied its insolvency. It was not necessary in that case to decide whether the company was solvent or insolvent; but the position then assumed by these complainants militates against them now upon the question of the value of their holdings in that company.

"Frank L. Dodge sued the purchasers of the Lansing, St. Johns & St. Louis Railway Company in this court for the debt due him from the latter company for services performed by him for it, and these complainants were witnesses for him in that case, and it is a grave question whether they are not now estopped from claiming there was no sale to the Lansing & Suburban Traction Company, for Mr. Dodge's suit was upon the theory that there was a sale, and therefore an assumption of the debts of the Lansing, St. Johns & St. Louis Railway Company.

"Having in mind what it owed, its prospects and condition, I am unable to say the stock of the Lansing, St. Johns & St. Louis Railway Company was of any substantial value the day defendants converted the same. I quite agree with the counsel upon the rule that, when it cannot be determined with certainty just the extent of damage arising from a conversion, the court should see the innocent saved from loss; but this case does not fall within such rule, for the reason that, before the rule can be invoked, some substantial damage must appear. The defendants being guilty, however, of the conversion of complainants' stock in the company, and the damages of the complainants being only nominal, the decree will fix the damages at six cents, and no costs will be awarded either party."

The complainants appealed from the decree in the lower court. The defendants did not appeal. The oral arguments and the briefs of counsel indicate a good deal of bitterness toward each other on the part of the litigants, who say very hard things of each other. We shall endeavor to make no further reference to that feature of the case.

The first Lansing, St. Johns & St. Louis Railway Company was organized in 1897. Its capital stock was

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$250,000. Of this stock each of the complainants had 36 shares, of the par value of $100 a share. This company proposed to build a line of electric road from Lansing to St. Johns, and then to St. Louis in this State. It succeeded in securing certain franchises and rights of way and attempted to get some one to construct the line. In April, 1900, another company of the same name was organized with a capital stock of $500,000. Each of the complainants had 72 shares of stock in this company, which they received in exchange for the stock in the former company. Each of the complainants was a director in both of these companies. In January, 1901, for the purpose of paying a debt of the company of $140, each of the seven directors of the company paid in $20 in cash, and each received therefor one share of stock. Shortly after the second company was formed, the work of construction was entered upon by Messrs. Mills, Percival, and Norris, who had a contract with the company, the details of which it is not necessary to relate here, further than to say they were given $500,000 in bonds of the company, secured by mortgage, and $300,000 of its capital stock. At the same time the two complainants placed their written resignations as directors in the hands of Mr. Mills to take effect at any time that he might designate. Later the resignations were accepted and new directors elected in the place of complainants.

In 1902 the litigation arose to which reference was made by the circuit judge in his opinion. Before the sale was made which gave rise to the present litigation, nearly $400,000 had been put into the enterprise by John E. Mills through the assistance of his father, Nelson Mills. The complainants did some work in securing bonuses and right of way. Their cash contribution did not exceed $320 each. It was expected to run the road as an electric road by a method which was in an experimental stage and did not prove to be a success. The road was never built farther than St. Johns. The contractors were not paid according to the terms of their contract. The sums

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secured in the way of bonuses were small. The affairs of the company were in a bad way. The stock standing in the name of John E. Mills was, by unanimous vote of the directors, after the death of John E. Mills, transferred to Nelson Mills, as was all the unissued stock. This was done because of reasons that were stated in detail in the resolutions, which reasons were proper ones. In March, 1904, a stockholders' meeting was held. Defendants claim due notice was given of this meeting. Complainants claim they had no legal notice of it. Upwards of 4,000 shares of the 5,000 shares of the capital stock were represented. At this meeting it was voted to transfer the Lansing, St. Johns & St. Louis Railway Company to the Lansing & Suburban Traction Company, if the latter company would assume the debts and liabilities of the former company. This was soon thereafter done. The complainants within a day or two learned of what was done. Later, in March, the action of the stockholders was ratified by the board of directors; but one of them voting against it. The Lansing & Suburban Traction Company also acquired by purchase the Lansing City Electric Railway Company, paying therefor $65,000, and assuming debts amounting to $100,000 or upwards. Later the Lansing & Suburban Traction Company, with many other properties in the central part of the State, became the property of the Michigan United Railways Company. There is nothing in the record to indicate a want of good faith in the sale of the company in which complainants were stockholders; but it is insisted by complainants there was a lack of good faith, and further that, even if there was not, as the forms of law were not followed, a constructive fraud was perpetrated upon them.

We quote from the brief of counsel:

"By becoming officers and directors of the Lansing, St. Johns & St. Louis Railway Company, the defendants became trustees for the benefit of all the stockholders interested in that company. As majority stockholders in the Lansing, St. Johns & St. Louis Railway Company, the

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defendants also owed a duty to the complainants as the minority stockholders to manage the affairs of the concern for the best interests and profit of all the stockholders.

" 'The directors of a corporation are ordinarily invested with the most extensive powers of management. They are empowered to represent the company in all its business transactions and ventures; and the entire corporate affairs are placed in their charge, upon the trust and confidence that they shall be cared for and managed for the common benefit of the shareholders, and in accordance with the provisions of the charter agreement. It is manifest therefore that the directors of the corporation occupy a position of the highest trust and confidence, and that the utmost good faith is required in the exercise of the powers conferred upon them.' 1 Morawetz on Private Corporations (2d Ed.), § 516.

"Directors occupy the position of trustees towards the stockholders. 2 Cook on Corporations (4th Ed.), p. 1262, § 648, note 3. And it has been frequently held that, even though the directors may be acting in good faith in transferring the property of the corporation to themselves, the transaction is fraudulent in law. It was held in the case of *Ervin* v. *Navigation Co.*, 27 Fed. 625, that the rights of stockholders could not be thus cut off, where a majority of the stockholders attempted to transfer all its assets to another company of which they were owners.

" 'Among the disabilities imposed by courts of equity upon those who occupy fiduciary relations towards others, respecting property which is to be administered for beneficiaries is that which precludes the fiduciary from purchasing the property on his own account.' *Ervin* v. *Navigation Co.*, 27 Fed. 625.

" 'Aside from the want of legal power already referred to, a court of equity will not permit the directors of a corporation, who are not only trustees for the stockholders of the corporation, but for its creditors as well, to thus dispose of the corporate property to themselves, or for their individual benefit. However in fact intended, equity treats such transactions as fraudulent because it operates as fraud upon *cestuis que trustent*.' *Farmers' Loan & Trust Co.* v. *San Diego St. Car Co.*, 45 Fed. 527.

"2 Cook on Corporations (4th Ed.), p. 1288, § 653; *Goddard* v. *Importing Co.*, 9 Colo. App. 306 (48 Pac. 279); *Fishel* v. *Goddard*, 30 Colo. 147 (69 Pac. 607); Eaton on Equity, p. 430, § 205; 1 Beach on Trusts & Trustees, p. 207, § 100; *Hindman* v. *O'Connor*, 54 Ark. 627 (16 S. W. 1052, 13 L. R. A. 492, and note)"—citing, also,

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Smith v. *Smith, Sturgeon & Co.*, 125 Mich. 234 (84 N. W. 144); *Sparrow* v. *E. Bement & Sons*, 142 Mich. 441 (105 N. W. 881, 10 L. R. A. [N. S.] 725).

It is their further claim that the circuit judge was wrong in giving them only nominal damages. They assert that defendants made large sums of money as the result of their conduct. We do not think the questions of law are troublesome, in view of the record as we find it. It will be observed that the complainants do not pray in their bill to be allowed stock in the Lansing & Suburban Traction Company, in lieu of their stock in the former company. A reference to the prayer for relief already quoted will show that complainants seek to recover the value the property of the Lansing, St. Johns & St. Louis Company has been to the Lansing & Suburban Traction Company and to the individuals named as defendants who are stockholders in that company. Counsel for complainants make a computation of values based upon the relations of the Lansing & Suburban Company and two of the stockholders in the prior company and also based upon an entry appearing in the books of the Lansing & Suburban Company which it is said is an admission of values, though the person who made the entry testified it was a mere matter of bookkeeping and was not based at all upon actual values. A careful examination of the record compels the conclusion that the computation is too chimerical to be accepted as a basis for a decree in favor of the complainants.

The record does not leave the question of values in the field of conjecture. It discloses that in March, 1904, the affairs of the Lansing, St. Johns & St. Louis Company had reached an acute stage. The original purpose to operate the road as an electric road had proven a dismal failure. The receipts from bonuses were very small. The road had no arrangement by which its cars could run into the city of Lansing. Its dummy train was drawn by a steam locomotive. The entire receipts of the road from the beginning of running its cars until March, 1904, a

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period of 26 months, were less than $8,000. This did not take any account of the interest charge on its debts, which was in excess of $50,000. The company was hopelessly in debt, and the debts constantly increasing, with no relief in sight. Unless conditions soon changed for the better, it could not continue as a going concern. Mr. Mills had invested about $400,000 in money in the undertaking. If he had resorted to the courts to enforce his claim, the road would not have sold for enough to pay it, and the stockholders would have received nothing. We have already recited what was done. There was a failure to literally comply with the law in making the sale; but it was made for an adequate consideration, and for the full value of the property. If all the formalities of the law had been followed, the result would have been the same, and the stockholders would have no reason to complain. The road at this time was insolvent, and the stock was worthless. After the road was sold and the Lansing & Suburban Traction Company had also taken over the Lansing city lines, the Suburban Traction Company was able to borrow, with the aid of Mr. Mills' indorsement—Mr. Mills was regarded as a very wealthy man—about $400,000. This money was expended in betterments, and the cars were run into the city of Lansing. The gross earnings of the two lines were kept separate, and, while they were operated as an entity, it is not difficult to determine from the record what charge should be made against the St. Johns line as its just share of the cost of operation. These figures show that from the time the sale was made up to the time when the proofs were closed, the net earnings of the line at no time reached the sum of $10,000 a year. This was exclusive of the charge for interest on the debts and some other proper charges. The debts assumed by the Lansing & Suburban Traction Company, as the consideration for the purchase, were in excess of $600,000. The interest charge, of course, would be in excess of $30,000. Not only does the record fail to show that defendants have profited by failing to literally follow

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the law in making the sale and in taking over the property, but it shows affirmatively that at no time has the property taken possessed any value in excess of its just liabilities.

The cases cited by counsel for complainants have been examined. A reference to them will show that they are easily distinguishable from the case under consideration. It is not believed a case can be found where relief was granted to a stockholder in a prior corporation which was sold to a later corporation under the circumstances disclosed by this record.

The decree is affirmed, with costs.

BLAIR, C. J., and GRANT, HOOKER, and BROOKE, JJ., concurred with MOORE, J.

MCALVAY, J. (*dissenting*). There is no dispute as to facts in this case, and no claim made by any one that the disposition made by the defendants of the stock of complainants in the corporation of which they were officers and directors was lawful or justifiable. Upon this proposition the opinion of Mr. Justice MOORE agrees with that of the learned circuit judge who tried the case. There can be no doubt but that both are as to that proposition absolutely correct.

It appears to me the conclusion of Mr. Justice MOORE, that it cannot be ascertained what was the actual value of this stock, or that it, in the then condition of the corporation, was of any market value, and therefore complainants are entitled to recover only nominal damages, is not supported by the record, or the principles of law which I think should be applied to this case. The relation between complainants and the officers and directors of this corporation who unlawfully appropriated complainants' property was a fiduciary relation. They were trustees and bound to care for and protect complainants' interests, and were strictly accountable to them in case of breach of trust. The manipulation by the defendants, who were active in making the unlawful sale, was not in the inter-

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ests of complainants; but their property was appropriated and used by them in such a manner as can leave no possible doubt as to the character of these acts, nor as to the intent of these defendants. Defendants have never denied their conduct or intentions. Upon this record they are confessedly guilty, but interpose the defense that the damages on account of the wrong committed are nominal. I do not agree that the record shows the damages complainants have suffered in this case, for the wrongful appropriation of this property, are merely nominal, and, in considering the case, its cost to complainants, or what they may have considered it worth, should not be considered. It was their property and considered by defendants of sufficient value to acquire its control and possession by the means adopted, and presumably necessary to carry out the scheme which they had devised, and which eventually was successfully consummated by the use of this and other stock of this corporation. The record shows that defendants did profit by this transaction. The books also show the same thing. These are admissions by them, and the stock excuse that this showing was a mere matter of bookkeeping deceives nobody. It would be grossly inequitable to allow them to profit by this unlawful appropriation. They are estopped in law and morals from denying accountability for such value as this property has been and is to them. This is a case where complainants are entitled to follow this property into whatsoever form or situation it may be shown to be, and have it restored to them, or recover its fair value in the condition they find it.

"As between *cestui que trust* and trustee, and all parties claiming under the trustee, otherwise than by purchase for a valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust." 28 Am. & Eng. Enc. Law (2d Ed.), p. 1108, note 10, citing *Board of Fire & Water Com'rs of Marquette* v. *Wil-*

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kinson, 119 Mich. 655 (78 N. W. 893, 44 L. R. A. 493), and other cases.

The special prayers of the bill of complaint, and the general prayer for relief therein contained, are in my opinion sufficient to warrant the relief to which complainants are entitled. The powers of a court of equity are broad, and where, as in this case, the acts done are admitted, and the result has been of the nature and extent herein stated, such court does not hesitate to grant relief to parties appealing for the exercise of its equitable powers. The property of complainants appropriated by defendants was impressed with a trust to be followed in their hands or the hands of others with notice, and its value recovered by complainants in whatsoever form found. The clear conception of the equities of the case have been purposely clouded by defendants, whose argument is that complainants' interest was worth nothing at the time of appropriation, and consequently a decree for a nominal amount was equitable. It would appear that defendants have overlooked the fact that the decree from which they have not appealed decides that there was an unlawful taking, and therefore under the law which we think applies to the case the increased value, if any can be shown was given to it by the activities of defendants, belongs to complainants. The record does not warrant the conclusion that this taking was simply an oversight in service of a notice of the meeting when the action was taken. On the contrary, the record shows the express intention to cut off such of these stockholders as they desired, *and leave them to their legal* remedy. This active fraud was followed by acts which clearly indicate the intention that, to ascertain their legal rights and interests in this property, stockholders who had been shut out would have no easy task.

An examination into the actual indebtedness of the Lansing & St. Johns Railway Company will, perhaps, be instructive and helpful in solving the difficulties of this case. It was capitalized for $500,000, and bonds of that amount were issued. The construction contract was given

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to John E. Mills and others to construct this road for its entire length for $100,000 cash, to be paid as follows: $35,000 to be paid on the completion of the first 10 miles, $35,000 when second 10 miles were completed; and the balance when a total of 25 miles was completed; also to issue to them 60 per cent. of the total capital stock on demand, at any time after the contract was executed; and, as a further consideration, to bond the road at $25,000 per mile, and deliver the bonds to the contractors. $500,000 bonds of an authorized issue of $1,750,000 were issued, certified by the Detroit Trust Company, trustee, and delivered to John E. Mills. These bonds were secured by a mortgage. No other bonds were then issued. John E. Mills negotiated a loan of $175,000 secured by a pledge of the bonds and the indorsement of Nelson Mills. The contract entered into was never completed by the contractors. John E. Mills became sick. His father, Nelson Mills, paid the $175,000 note given to the Detroit Trust Company. The bonds pledged as security were then turned over to him. No statutory foreclosure and sale of the pledged property was had. In 1902 complainants were voted out of office as directors. Later defendants became directors, and, voting this stock which had been issued to them, controlled the organization. In order to make them eligible, some of them had been given a share of stock each. In 1903 defendant Myron W. Mills became president and James R. Elliott vice president. Then, for a claimed consideration that rights of way between Lansing and St. Johns had been procured and paid for by John E. Mills, the balance of the treasury stock, being all the remaining unissued stock of the corporation, and all subscription stock issued but not paid for, was voted to be issued to Nelson Mills, successor to all the rights of John E. Mills, giving him control or actual possession of 3,980 shares of the 5,000 shares of stock. This was done without any showing in the record of the amount actually involved. The record shows that the Mills stock was all voted at all of the meetings in favor of these different propositions

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above stated. The record does not show that any of the defendants except the interest now represented by Myron W. Mills ever paid any consideration for any of the stock in this company, or invested any money in any of the transactions involved. Defendants claim that this corporation was at that time indebted as follows: Bonded indebtedness and interest, $571,000; balance unpaid on contract for construction, $60,000; total, $631,000. This is the construction contract which John E. Mills and others undertook to perform, but never completed further than St. Johns, and we do not find in the record that this balance was a valid subsisting indebtedness, nor do we find that more than $175,000 of indebtedness existed at this time against the bonds, which were held by the Mills interest as security for practically all of the indebtedness.

About this time another corporation, called the "Lansing & Suburban Traction Company," was organized by these defendants for the purpose of taking over the Lansing & St. Johns Company and the Lansing City Electric Railway Company. This last-named road the Mills Company and defendants Elliott and Moore had acquired for $65,000, which was paid by a note of the Mills Company for that amount. In this transaction also none of the defendants except the Mills interest paid any consideration. The transfer of the Lansing & St. Johns Company was made in consideration of the assumption of its indebtedness by the new corporation, when the Mills interest voted the majority of the stock. The Lansing City Electric Railway Company was transferred for $65,000 and the assumption of $100,000 indebtedness. These transfers occurred in March, 1904. John E. Mills had died in July, 1903. Nelson Mills became ill, and, for the purpose of carrying on these transactions, the Nelson Mills Company was organized, which included all of these individual defendants; Moore and Elliott holding one share of stock each. The articles of incorporation of the Lansing & Suburban Traction Company were filed March 9, 1904. The incorporators were Nelson Mills, Myron Mills, James

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R. Elliott, and George G. Moore, who were named as directors and officers. Elliott and Moore put no money into the deal. It was capitalized for $1,000,000, of which $10,000 was issued to each of the above named. Nelson Mills died March 15, 1904.

The book value put upon these properties combined in this was $1,727,515.92. This is the evidence defendants claim was only a matter of bookkeeping. Whatever they may call it, it was the basis used from which was deducted all bonds and indebtedness, leaving $1,000,000 credit, upon which the entire stock was treated as fully paid, and the majority part of it issued to and held by defendants as such. At this time some of the original stockholders of the Lansing & St. Johns Company, who were identically interested as these complainants, were given, for their 73 shares, 100 shares of the Lansing & Suburban as fully paid and nonassessable. Defendants Mills and Elliott represented that this stock was worth about par. The rights of these original stockholders were explicitly recognized. A bond issue of the new company was negotiated for $750,000 for the purpose of taking up and canceling the outstanding bonds of the two old companies, and for making extensions and additions to the properties. $300,000 of the bonds of the Lansing & St. Johns Company held by Nelson Mills to secure $175,000, which he had paid as before stated, were at this time canceled, leaving but $200,000 of said bonds outstanding as such security. This was done with the consent of the Detroit Trust Company and Mr. Mills. It will be understood that this cancellation wiped out $300,000 of the claimed indebtedness of the Lansing & St. Johns Company, which defendants insist must be considered in this case as part of its indebtedness. This clearly shows that these bonds of this company were merely security for the indebtedness to Mills. A sufficient amount ($175,000) of the Lansing & Suburban bonds were issued to take up the old bonds of the two roads merged and take care of

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extensions, etc. All of these bonds were in fact placed in the hands of the Mills Company, which hypothecated them with the Knickerbocker Trust Company for a loan of $450,000. Later another trust deed was made for $1,000,000 to provide for the retirement of the $750,000. The balance of which ($250,000) was used as collateral to loans.

The next step taken by these defendants was a project to merge the Lansing & Suburban Traction Company with several other properties which they had acquired, or intended to acquire, into a corporation called the "Michigan United Railways Company." This corporation was organized with a capital of $5,000,000. It made a trust mortgage for $7,500,000 for the purpose of acquiring and paying for the properties to be merged. Defendant Myron W. Mills was president of this corporation, and defendants Elliott and Moore directors. The Lansing & Suburban Traction Company was sold to the new corporation for $1,000,000 of its common stock. Provision was made in the trust mortgage that, of the bonds to be issued, $1,600,000 should be delivered to the president, Mills, or the vice president, Elliott, for which they were not to be accountable to anybody. This was done, and out of the proceeds the Mills Company was paid in full for all claims of every nature which arose out of the transactions had with the Lansing & St. Johns road, and $240,000 were paid in profits to defendants. A more extended statement of the history of this transaction will be found in *Dodge* v. *Mills*, 150 Mich. 394 (113 N. W. 1123).

These facts relative to the Michigan United Railways are material as showing that the claim, as above stated, of the Mills Company, was satisfied. This is in fact the culmination of this chapter in high finance. All the facts herein narrated show that a deliberate plan was conceived and carried out to absolutely ignore the rights of complainants in this property. The record shows a strained effort to inflate the indebtedness of the Lansing & St. Johns Company contrary to the facts. It shows that this

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property and its prospects were valuable, and so known to be by defendants; that they paid for it about twice as much as for the Lansing City Electric Railway property; that they recieved for it from the Lansing & Suburban par value for all its stock; that they recognized the same rights these complainants are here contending for in others who owned equal stock, and paid them in full in stock, share for share, with an addition, called "a gift," of 27 shares, making $10,000 to each. The Mills people were simply the bankers of this combination. They were at no time without security which they considered good, and the result shows that their judgment was good. Not only have they been paid in full, but have taken their share of the balance of $1,600,000 in profits which have been divided between them, and of the $1,000,000 in stock in the Michigan United Railways, which was distributed to them. As said earlier in this opinion, complainants are entitled to the value this stock acquired in the hands of defendants, which they recognized, and upon which they repeatedly acted, and that was its par value. There is nothing chimerical or speculative about this. It is the application of equitable principles which are fundamental to facts which are not in dispute. Defendants relegated these parties to such rights as the law afforded them, and this court finds that each is entitled to the sum of $7,300, with interest from March 9, 1904.

A decree should be entered in favor of complainants modifying the decree of the circuit court in accordance with this opinion, and with costs of both courts.

MONTGOMERY, J. I concur in the view that complainants are entitled to recover substantial damages, but am not prepared to say that the amount should be that stated in the opinion of Mr. Justice MCALVAY.

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In re FOX'S ESTATE.

ON REHEARING.

1. EXECUTORS AND ADMINISTRATORS — ESTATES OF DECEDENTS — DISTRIBUTION OF PERSONAL ESTATE.

   The net personal estate for distribution consists of the personal property of the deceased after all debts and expenses, including debts secured by mortgage upon real estate of the deceased, have been deducted.

2. TAXATION—INHERITANCE TAX—DEDUCTION OF MORTGAGE DEBT —PROBATE OF ESTATES.

   The amount of personal property of an estate subject to inheritance tax under Act No. 195, Pub. Acts 1903, is determined by deducting mortgage and other debts from the personal estate. *In re Fox's Estate*, 154 Mich. 5 (117 N. W. 558), overruled.

3. SAME—STATUTES—INHERITANCE TAX.

   The form provided by Act No. 195, Pub. Acts 1903, which indicates that debts against the estate secured by mortgage are to be deducted from real property of the estate, does not change the effect of other sections of the law.

Case made from Kent; Sessions, J., presiding. Submitted April 13, 1908. (Docket No. 59.) Decided September 10, 1908. Motion for rehearing granted May 25, 1909. Reargued June 14, 1909. Former opinion vacated December 31, 1909.

John F. Wilkinson, deputy auditor general, appealed to the circuit court from an order of the probate court determining the amount of inheritance tax due the State from the estate of E. Crofton Fox, deceased. A judgment overruling the order of the probate court is reviewed by the estate upon a case made. Reversed.

Kleinhans & Knappen (*Gray & Gray*, of counsel), for the motion.

John E. Bird, Attorney General, and *Thomas Ambrose Lawler*, Assistant Attorney General, *contra*.

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MONTGOMERY, J. This case is reported in 154 Mich. 5 (117 N. W. 558). The facts are there sufficiently stated. A rehearing has been granted upon the question of whether, in the determination of an inheritance tax, a debt of the deceased secured by real estate mortgage should be deducted from the personal estate in determining the amount upon which the tax is to be paid. The conclusion was reached in our former opinion that no deduction should be made on account of such mortgage indebtedness. In reaching that conclusion reliance was placed upon New York decisions, which are based upon a statute similar to our statute imposing a tax on inheritance. We are convinced that in reaching this conclusion we failed to give sufficient force to the distinction which exists between New York and Michigan, as to the law for the distribution of estates. It is the undoubted rule in this State that the net personal estate for distribution consists of the personal property of the deceased after all debts and expenses have been met, including the debts secured by mortgage upon real estate, such debts being a charge upon the personal estate, as well as unsecured debts. *Larzelere* v. *Starkweather*, 38 Mich. 96; *Willard* v. *Van Leeuwen*, 56 Mich. 15 (22 N. W. 185); *Osmun* v. *Oakland Circuit Judge*, 107 Mich. 27 (64 N. W. 949); see, also, Schouler on Executors and Administrators, §§ 430, 512; 3 Williams on Executors (7 Am. Ed.), p. 147.

The statute of New York, on the other hand, provides that:

"Whenever any real estate, subject to a mortgage executed by any ancestor or testator, shall descend to an heir or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property, without resorting to the executor or administrator." N. Y. Rev. Stat. (1st Ed.) pt. 2, chap. 1, tit. 5, § 4.

The cases cited from New York would indicate that the conclusion of the New York courts that the amount of a mortgage is not to be deducted from personal property in determining the amount to be taxed is based, in large part at

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least, upon the fact that, under the statutes of distribution, the real estate, and not the personal property, is chargeable with the debt.

In re Kene's Estate, 29 N. Y. Supp. 1079, in overruling the appraiser who held that the mortgage should be deducted from the personal estate, and not from the real estate, the surrogate said:

"If this view [that of the appraiser] were correct, the mortgage would be satisfied out of the personal estate, and the devisee of the house and lot would take it free therefrom, and so be liable to the payment of the tax. In this he [the appraiser] seems to be in error. Such was the rule in England. But it was changed in this State as early as 1786, and is continued to the present day"—citing the statute above referred to.

In re Livingston's Estate, 1 App. Div. (N. Y.) 568 (37 N. Y. Supp. 463), the real estate was subject to a mortgage, and the executor had power to use the personal estate in paying the mortgage, and he contended that the mortgage debt under the circumstances ought to be deducted from the personal estate. In overruling the contention of the executor the appellate court said:

"The learned surrogate, in declining to reduce the personal estate as demanded by the appellant, acted upon the principle that the mortgage debt was, under the Revised Statutes, properly payable by the heir or devisee. N. Y. Rev. Stat. (1st Ed.), pt. 2, chap. 1, tit. 5, § 4. The appellant insists that the statute (which requires mortgage debts to be paid from the real estate) is inapplicable to cases where the same persons take the realty and personalty as a blended fund. The contrary seems to us to be the correct view."

We are convinced that the intent and purpose of this statute was to tax the personal estate subject to such deductions as should be made directly under the general statute of distribution.

Attention has been directed to section 17 of the act (Act No. 195, Pub. Acts 1903), which prescribes the form of the order to be followed by the probate judge. This form

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was evidently copied from the New York statute, but can hardly be held, in and of itself, to have established a rule for fixing the amount of the inheritance tax. That is done by other provisions of the statute which render the form inserted inapplicable.

The order of the court below should be reversed and the order of the probate judge affirmed.

BLAIR, C. J., and GRANT, OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred with MONTGOMERY, J.

MCALVAY, J. (*dissenting*). Appellant was granted a rehearing, and urges that both the circuit court and this court were in error, for the reason that the New York cases relied upon were founded upon the construction of a statute different from the statute of this State, relative to the payment of a mortgage debt upon real estate; that the statute of New York requires the heir or devisee to satisfy the mortgage out of his own property, unless otherwise provided by will, and that in Michigan the personal estate of a decedent is first chargeable with the payment of all debts. Upon a re-examination of the cases cited in the opinion of the learned trial judge, and the conclusions drawn therefrom, adopted by this court in this case (154 Mich. 5 [117 N. W. 558]), and a consideration of the briefs and oral arguments upon the rehearing, we are satisfied that the former decision was correct. The statute provides for the taxation of inheritances, transfers of property, etc., and is known as the "inheritance tax law." The question involved does not affect the classification under the statute. The rule laid down does not discriminate between those in the same class. The statute was construed to require the deduction of the value of a mortgage upon real estate from the value of the real estate, to find the basis *in computing the amount of the inheritance tax.* No one is given any property by such determination, nor is any property taken from any one. The basis adopted is the only one clearly intended by the legislature, in the

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form of the judicial determination of the probate court of transfers subject to inheritance taxation, required by section 17, Act No. 195, Pub. Acts 1903, and does not repeal any of the statutes of this State relative to administration and distribution of estates of deceased persons, and in fixing such basis the legislature was clearly within its constitutional authority. This is not a tax upon property, but upon the transfer, and the construction given applies to all transfers of the kind in question.

It was urged, when the case was first argued, that the New York cases were based entirely upon the New York statute, and the opinion discusses the question, citing *In re Livingston's Estate*, 1 App. Div. (N. Y.) 568 (37 N. Y. Supp. 463); *In re Offerman's Estate*, 25 App. Div. (N. Y.) 94 (48 N. Y. Supp. 993); *In re Pullman's Estate*, 46 App. Div. (N. Y.) 574 (62 N. Y. Supp. 395), etc. From these cases it appears that the matter was discussed, and is passed upon against the present contention.

NORRIS *v.* McFADDEN.

1. LANDLORD AND TENANT — UNFITNESS OF PREMISES — FRAUD — CONCEALMENT—THEATER—DEFENSE

In an action for the rent of a building leased to the defendant for use as a theater, unfit for that purpose, and known by the landlord so to be, because of its inflammable condition and because of the action of the common council requiring certain changes, before allowing it to be used for theatrical purposes, it is not an answer to the claimed defense that the defendant might have seen the condition of the theater when, in fact, he did not know of the requirements of the common council as to the safety of the building leased.

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2. EVIDENCE—HEARSAY—OFFICIAL RECORDS OF COMMON COUNCIL.
The records of such action of the common council, containing the reports of officials in the line of their duty in regulating the building in the interest of public safety, were improperly excluded as hearsay evidence, and were competent to prove the action of the municipal authorities.

3. LANDLORD AND TENANT—LEASE—CONSTRUCTION—CONTRACTS.
Under a clause in the lease providing that certain specified changes should be made by defendant in strict accordance with the law of the State and the local ordinances, the duty of placing the building in safe condition, as required by the action of the municipality, did not devolve upon the tenant, who thereby merely undertook to make the alterations intended, in accordance with law.

4. SAME—LEASE—EXCUSES FOR NONPERFORMANCE.
Placing firemen in the building in the interest of public safety was not a trespass which excused the plaintiff from placing his premises in suitable condition for the purposes intended by the lessee.

5. SAME—RECOUPMENT—DAMAGES.
Recoupment lies for the damages sustained by a tenant because of a landlord's default in placing the premises in suitable condition for use as a theater, notwithstanding a partial compliance with the municipal requirements, if the jury find the tenant surrendered the premises because of the default.

Error to Kent; Sessions, J., presiding. Submitted January 7, 1909. (Docket No. 36.) Decided December 31, 1909.

Assumpsit by Mark Norris, trustee, and another against Austin McFadden for rent. A judgment for plaintiffs on a verdict directed by the court is reviewed by defendant on writ of error. Reversed.

McKnight & McAllister, for appellant.

Taggart, Denison & Wilson (*Albert Crane*, of counsel), for appellee.

MCALVAY, J. Plaintiff, as trustee representing the

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owners of a building called the "Auditorium" in Grand Rapids, on September 6, 1904, rented the same (not including the basement and part of one gallery) to defendant by a lease in writing signed by the parties, for the term of one year after October 1, 1904, with the privilege of renewals from year to year for the further period of four years from its termination, by giving notice of such renewal on or before May 1st of each year. Thirteen dates were reserved by plaintiff under contracts made by him before this leasing. The property leased was to be occupied by defendant "for a roller skating rink, theater, and concert hall." The annual rental, $4,800, was to be paid in six equal installments at times and a place stated in the lease. The lease contained the ordinary agreement by the lessee to repair, reasonable use and wear and damage by the elements excepted. Defendant went into possession of the premises, and for a time conducted a skating rink. In April, 1905, defendant gave notice of a renewal for another year, and entered into a written agreement with plaintiff on August 23, 1905, relative to contemplated changes, alterations, and scenery in said Auditorium according to plans and specifications to be approved by plaintiff. These changes consisted in certain scenery, dressing rooms, and a fly gallery, and were to comply with the statutes of Michigan and the ordinances of Grand Rapids. Twelve hundred dollars of the expense of these changes and scenery was to be allowed defendant out of rent, but to be repaid in case the lease was not renewed for the year 1906–1907. Defendant expended $2,700, including this $1,200. The Auditorium had been used for concerts and political meetings before defendant rented it, but was not fitted up for theatrical performances.

The first performance was on November 27, 1905. Plaintiff was required to promise the city building inspector certain changes before a performance was permitted. Firemen were placed by the fire marshal on the premises in the presence of the people, on account of

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which no performance was had, and the money was refunded to those who attended. No performance was allowed, except on special occasions, because the building was not fixed as ordered, and men in uniform on each occasion were stationed through the audience. But five performances were given. Agents would not book performances on account of the condition of the house. Defendant went out of the place in June, 1906. His claim is that he had no knowledge that the authorities had required certain things to be done by the plaintiff, for the public safety, until after he had renewed his lease and made the changes contemplated by the second agreement, and that plaintiff, having knowledge of these facts, and having agreed to comply with the demands of the authorities, leased defendant a building unsuitable for the purposes required.

In January, 1904, shortly after the Iroquois theater disaster in Chicago, a committee, which had been appointed by the common council of Grand Rapids, consisting of the ordinance committee, the board of police and fire commissioners, fire marshal and building inspector, "to examine the several opera houses, theaters and places of amusement in the city, to ascertain if such places are so constructed and operated as to comply with the requirements of the city ordinances, and what, if any, changes should be made to render them entirely safe to the public," reported to the council, together with a recommendation for its adoption, and that a certified copy of the report be delivered to the owners of the properties affected, and that each of them be required within 60 days after such notice to make the changes recommended. As to the Auditorium, the changes required were "to put in a wide stairway at the northeast corner of the building from the sidewalk to the balcony and main floor, and stairs leading from the same to the ground; that call boxes be placed in the building and at least two lines of hose be placed on the main floor, two in the balcony and two on the stage, to cover all exposed woodwork in the basement with ex-

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panded metal lathing and two coats of hard plaster; also a cement floor and automatic spinkler system in the entire basement. We recommend that there should be watchmen that would be acceptable to the fire marshal employed to patrol the basement during each and every occasion that the hall shall be used, until above mentioned requirements are completed." The report was adopted, and plaintiff duly received a certified copy. The basement under the stage was occupied by tenants of plaintiff, where furniture was packed, and a furniture repair shop was conducted. Plaintiff had conferences with the city authorities after this, and put in a new exit in front in place of the iron stairway, and put in a double floor lined with asbestos, replastered the basement with metal lath, also put in iron columns in place of wooden ones. The automatic sprinkler was not put in, nor the lines of hose on the stage and balcony. This was the condition when he rented to defendant.

Afterwards, in February, 1906, the council again considered this matter, and a special committee made report as to what defendant had done and omitted to do, relative to the changes required by action taken in January, 1904. This report shows the condition in the basement under the Auditorium as to liability of fire from the inflammable nature of the material crowded into it, and the use of a gas stove within a few inches of an unprotected wooden partition. This committee recommended other and further changes to be made by plaintiff, and expressed the opinion that the condition at this place was hazardous; that the proprietors be required to make the changes required in 30 days and that a patrol of five experienced firemen, by arrangement with them, be detailed to be present during all times when audiences were convened, and in default of compliance the Auditorium be closed forthwith. Plaintiff was present and addressed the council upon the matter. After some modification as to cement floor, and the time for building a wall, the report was adopted. The matter, as far as the evidence or proof offered shows, re-

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mained in *statu quo* until June 11, 1906, when plaintiff sent a letter to the council, wherein he states that he is advised that the matter of the changes ordered in this building will come up for discussion, and proceeds to give his reasons why he has delayed in the matter, stating that the contracts have been let, but it had been impossible for contractors to get materials, etc., and closes by saying:

"The delay in complying with the requirement of the council has not been caused by any desire on the part of the owners to delay or fail to observe reasonable requirements, but simply on account of weather conditions and inability to get the material required for the work."

Under these conditions, the changes required by the council not having been completed, the defendant, who had gone on making the changes referred to in the agreement of August 23, 1905, relying, as he testifies, upon the promises of plaintiff made to him to complete the required changes ordered by the city authorities, went out of the building and turned the keys over to plaintiff June 19, 1906.

Upon the trial defendant offered in evidence the records of the common council of Grand Rapids to show the official action herein briefly outlined. These were objected to as hearsay and excluded. Plaintiff and defendant were the only witnesses in the case. At the close of the case plaintiff moved for an instructed verdict, which was granted by the court on the grounds:

(1) That there was no liability of the landlord for failing to show defects open to observation or reasonable investigation.

(2) That the records of the common council were not substantive proof of the facts contained in the reports, but was hearsay.

(3) That defendant was as responsible as the landlord for failure to comply with the municipal requirements by reason of the contract of August 23, 1905.

(4) That the firemen placed in the building were trespassers.

A verdict was directed for the full amount of $3,348.47.

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Errors are assigned upon this action of the court. The case is here upon a writ of error sued out by defendant to review this action of the court. He claims that none of the reasons of the court were sound, as a matter of law.

1. Defendant had no knowledge of the action of the authorities in ordering the plaintiff to comply with orders to make the building safe for the public, and plaintiff withheld such knowledge from defendant. No examination of the premises leased by defendant would have disclosed the requirements of the common council relative to the safety of the building.

2. The records offered in evidence were the official records of the council kept as required by law. The matter was within the province and authority of the council to consider and act upon, and the record contained the action taken by the council. The reports embodied in this record were the reports of city officials made in the line of duty and reported to the legislative body. We think the record presented was admissible as evidence under the statute of the official action of the council in regard to the regulation of the building in the interests of the public safety. Jones on Evidence, § 520; 1 Greenleaf on Evidence, § 483; *Thurstin* v. *Luce*, 61 Mich. 292 (28 N. W. 103); *People* v. *Kemp*, 76 Mich. 410 (43 N. W. 439); 3 Comp. Laws, § 10193. It was error to exclude these records.

3. The court held that, on account of the agreement of August 23, 1905, defendant was equally responsible with his landlord for failure to comply with the requirements of the council. This agreement had no reference to the things ordered done by the council. It was entered into nearly two years after the first action of the council, and the clause relied upon by plaintiff and construed by the court reads:

"Said McFadden shall cause all such changes and alterations to be made of first-class materials and workmanship in accordance with the plans and specifications to be prepared as above specified and in strict accordance with

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the laws of the State of Michigan and the ordinances of the city of Grand Rapids."

These changes consisted of scenery, dressing rooms, and a fly gallery, and were put in by permission of the proper authorities, and plaintiff, when in making these changes it was discovered that the proscenium arch was a wooden truss, was notified by the authorities of that fact. He put in one of metal and tile as ordered by the authorities, and did not claim that such construction was equally obligatory upon defendant. This was the practical construction of the parties at the time. The clause in the agreement of August 23d had reference to the changes to be made by defendant therein specified, and was no undertaking on his part to conform with the orders of which he had no knowledge. The court was in error in his construction of this agreement.

4. We do not take the view that the firemen were in the building as trespassers merely. The authorities, in the interest of the public safety, had a right to take such reasonable precautions as might be necessary. It is urged that they might close the place, but could not put men in the building to protect the public from danger in case a fire broke out. We are not prepared to say that the action of the officers in putting men in the building was unreasonable or unlawful. In any event it is no defense for plaintiff.

There was some evidence in the case as to the condition of this basement other than in the reports of the officers. It is stated in the testimony of defendant, and plaintiff's letter to the council shows, that he acquiesced in all material respects, although not with any evidence of speedy completion. The first order of the council was made January 18, 1904, and when defendant surrendered the keys June 19, 1906, the requirements of this order were not completed. Defendant leased and went into possession, October 1, 1904, to occupy and use the Auditorium for "a roller skating rink, theater and concert hall." At this time plaintiff knew, and defendant did not know,

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that these premises could not be used for the purposes for which they were leased, and he did not disclose that fact. These facts seem to be undisputed. The court was in error in taking the case from the jury.

Defendant pleaded recoupment for damages. He is entitled upon his theory of this case to make proof of such damages as may be proper under the pleadings and circumstances of the case, and to recover such amount as may be found, provided it is determined that he surrendered the premises because of the default of plaintiff.

The judgment is reversed and set aside, and a new trial ordered.

BLAIR, C. J., and MONTGOMERY, OSTRANDER, HOOKER, MOORE, and BROOKE, JJ., concurred with MCALVAY, J.

GRANT, J. (*dissenting*). Mark Norris, one of the plaintiffs, as trustee under the will of Charles Shepard, deceased, and as executor and trustee under the will of Dorinda N. Shepard, deceased, and the other plaintiff, executed to defendant, on September 6, 1904, a lease of the Auditorium, so-called, in the city of Grand Rapids, for the term of one year from and after October 1, 1904, with the privilege of renewing the same from year to year for the further period of four years; the lessee to give the lessor written notice of such renewal on or before the 1st day of May in each year.

The Auditorium was a public hall, used for public entertainments and amusements. It contained a ground floor, balcony, and stage. The basement under the Auditorium was not used in connection with it, but was rented by plaintiffs to private parties—a part to Young & Chaffee, who carried on a furniture business in an adjacent building, and used part of the basement of the Auditorium as a packing room and storing room for mattresses, furniture, etc. Another part was leased to the Grand Rapids Evening Post, and a third part to the New Era Life Insurance Company. The lease contained no covenant to repair, or

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any covenant that the demised premises were suitable for the purposes stated in the lease. The lessee covenanted to make repairs. The defendant was an experienced theatrical manager, familiar with places of amusements, their construction, and the usual methods resorted to for the protection of patrons. Defendant went into possession, and from September, 1904, to April, 1905, used the building for a skating rink. In April, 1905, defendant gave plaintiff notice of his intention to renew the lease for another year. The Auditorium was not designed or equipped as a theater; it was used mainly for concerts, political meetings, and the like. Defendant desired to equip the Auditorium for theatrical exhibitions, and he and Mr. Norris as trustee on August 23, 1905, entered into an agreement referring to the former lease, reciting defendant's desire to make certain changes and alterations in the Auditorium, with a view to make it practicable for use as a theater. That agreement required the defendant to make the necessary plans and specifications for the contemplated changes, and to comply with the statutes of the State and ordinances of the city relative to the same. Defendant was likewise to procure all necessary permits for the making of such changes and alterations, and the addition of scenery. He also agreed to make these changes and alterations in accordance with the plans and specifications so prepared, and in strict accordance with the laws of the State and ordinances of the city. The agreement then proceeded to recite certain specific things that he was to do. Defendant was to pay for all these changes and alterations, Mr. Norris agreeing to allow upon rent $1,200 for such improvements, specifying the times when it should be allowed. In case defendant failed to renew his term for the year October 1, 1906, to October 1, 1907, then he was to repay Mr. Norris the amount so allowed. Defendant proceeded to make these improvements, and continued in the possession of the theater until June 18, 1906, when he abandoned the premises. This suit is brought to re-

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cover rent due under the lease and the amounts allowed defendant as rent for the improvements.

The defense is that the premises were unfit for the purposes for which they were rented; that the defendant was unable to use them; that the Auditorium had been condemned by the public authorities as unfit, unsafe, and dangerous for the purpose for which it was rented; and that these facts were concealed from the defendant. The facts upon which the defendant relies are as follows: On January 18, 1904, the building inspector and fire marshal, in accordance with a resolution of the common council, had examined the various places of amusement with a view to recommending changes for the protection of the public. They recommended that at the Auditorium there should be put in a wood stairway at the northeast corner of the building, from the sidewalk to the balcony and main floor, a stair leading from the same to the ground; that call boxes be placed in the building, and at least two lines of hose be placed on the main floor, two in the balcony and two on the stage; that all the exposed woodwork in the basement be covered with expanded metal lathing, and two coats of hard plaster; that a cement floor be put in and an automatic sprinkler system installed in the basement. This report was adopted. Mr. Norris built an exit in lieu of the stairway. He put in a double maple floor, lined with asbestos; replastered the basement on metal lath, and, discovering that there were wooden posts supporting the Auditorium floor, he took them out and put in iron columns. These were accepted by the council as sufficient. When defendant was proceeding to equip the theater under the contract of August 23, it was discovered that the present proscenium arch was a wooden truss that spanned the opening, instead of brick. This was removed and a steel truss put in its place. Mr. Norris ordered the automatic sprinkler, but the contractors would not agree to put it in within the time required, as the manufacturers of the valves could not agree to furnish them to the contractor at a specific time. The

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material, however, had arrived, and the sprinkler nearly completed before the defendant abandoned his contract. Telephones had been permitted by the council to take the place of the call boxes required. The two lines of hose had been installed upon the stage, but had not been installed on the main floor or the balcony. On February 13, 1906, the committee of the council, among other things, recommended that a division wall between the stage of the Auditorium and that part of the building facing on Fountain street should be constructed of either brick or tile, and carried through and above the roof. This the committee regarded as one of the most essential recommendations. The committee recommended, upon failure to comply with these requirements, that the Auditorium be closed. On June 11, 1906, Mr. Norris sent a communication to the common council, stating that he had endeavored to get the automatic sprinkler installed within the time required, that he had made a contract with the parties to put in as expeditiously as possible, and that the material was then arriving. He also reported that the contract for the hose and pipe for the main body of the Auditorium had been let for a number of weeks, and he did not understand why it had been delayed. He further reported that he was informed by the Iron Works which had the contract, that the material had arrived, and would be put in as soon as possible. He also reported that he could not put in the wall then without driving all the tenants out of the building, because he was obliged to maintain fires as late as the week before for the benefit of the tenants.

Defendant testified as follows:

"*Q.* What is the reason you could not carry on the theater?

"*A.* Because certain improvements had not been made that were ordered.

"*Q.* What improvements?

"*A.* Installing the sprinkler system and hose."

The theater season was practically over, and Mr. Norris had reported to the council that all the improvements

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ordered would be completed before the next season opened. The common council, upon the assumption that they had the right to do so, placed several policemen in different parts of the Auditorium during the theatrical peformances. Defendant ran the place without any interference on the part of the authorities from October, 1904, to October, 1905. He commenced work under the second contract in September, and completed the work in about six weeks; his first performance being November 27, 1905. The authorities had not condemned the Auditorium or ordered it closed, or interfered with its occupancy or exhibitions. The special committee of February 13, 1906, recommended that, pending the completion of the changes which they had recommended, the board of police and fire commissioners arrange for a patrol of not less than five experienced firemen to take up and maintain positions in the basement of the Auditorium and the wings of the stage, and such other places as the fire marshal may indicate, but not in the aisles of the Auditorium, and that these men be kept on guard during all hours in which audiences are convened in the Auditorium, and that the proprietors pay the city such compensation therefor as may be agreed upon with said board. This recommendation was adopted by the council. Policemen were placed in the building in accordance with this resolution. At the close of the testimony the court directed a verdict for the plaintiff.

1. Does the rule of *caveat emptor* apply? Undoubtedly anticipating that this rule might be applied, counsel for the defendant sought to establish the fact that Mr. Norris, the landlord, had purposely concealed conditions, known to him but not to the defendant. There is no foundation in fact for this claim. Every nook and corner of the building, its construction, its condition and basement were as open to the inspection of the defendant as to the plaintiff. The building was leased for the same purpose for which it had been occupied for many years, without protest or objection on the part of the municipal authorities. The defendant, an experienced theatrical

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man, must certainly be held to have been better acquainted with requirements and surroundings of a theater or place of amusement than Mr. Norris, a lawyer. He is also presumed to have known the laws of the State, and the ordinances of the city, which were as open to him as to the plaintiff. Defendant must have known that municipalities, through their common councils and boards, have certain control over such places and the right to provide reasonable rules and regulations for the protection of the public. These rules and regulations are matters of public record, and were open to the inspection of the defendant. A fire resulting in terrible loss of life had shortly before occurred at the Iroquois theater in Chicago. In all cities throughout the country theaters were being investigated by municipal authorities, and stringent rules and regulations enacted. The city of Grand Rapids was not an exception. The defendant knew, or should have known, this, and if he desired to know what those rules and regulations were before taking the lease, he could readily have done so. He cannot complain now or claim any fraud or concealment on the part of the landlord in not telling him what they were. Mr. Norris was not called upon to speak, and was guilty of concealing no fact which the law required him to state. He was guilty of no wrong in law or morals.

Defendant makes no claim that the building was defective. Every condition now complained of was open to his view. He knew the condition of the basement, or, what is equivalent in law, should have known it. He knew there was no hose in the main floor and the galleries. In other words, he saw the situation, and after his examination entered into a lease which exempted the landlord from any liability to repair, and imposed that liability upon him. In such case the rule of *caveat emptor* applies to a tenant. "His eyes are his bargain." If he desires to protect himself against the requirements of the public authorities, or against inherent and unknown defects, or against present or subsequent conditions of any

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kind, he must protect himself by provisions in his contract; otherwise the law gives him no remedy. In the absence of any concealment of known defects, and of any warranty that a building is in suitable condition for the purpose for which it is to be rented, the lessee must make such examination as he chooses for himself, and determine for himself whether the building is suitable for the purpose for which he desires to lease it. The law does not permit him afterwards to say, "The building is not suitable or in proper condition."

The word "demise" in the lease of a house for years "implies a covenant for title in the estate merely; that is, of quiet enjoyment against the lessor and all that come in under him by title." Such a lease contains no covenants against the acts of trespassers or strangers, or the requirements of public authorities having police control over the leased premises. In a leading case upon this subject, decided in 1843, the court say:

"There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise; and there are many which clearly show that there is no implied contract that the property shall continue fit for the purpose for which it is demised." *Hart* v. *Windsor*, 12 Mees. & W. 68.

This case is cited with approval by many of the courts of this country, and correctly states the rule. *Toner* v. *Meussdorffer*, 123 Cal. 462 (56 Pac. 39); *Watson* v. *Almirall*, 61 App. Div. (N. Y.) 429 (70 N. Y. Supp. 662); *Moore* v. *Weber*, 71 Pa. 429 (10 Am. Rep. 708); *Town* v. *Thompson*, 68 N. H. 317 (44 Atl. 492, 46 L. R. A. 748); *Gallagher* v. *Button*, 73 Conn. 172 (46 Atl. 819); *Howell* v. *Schneider*, 24 App. Cas. (D. C.) 532, and authorities there cited.

The contract of leasing contained no implication that the landlord should make changes that the common council should demand or deem expedient. The landlord had agreed to furnish nothing but the room leased in the condition in which it then was. The lessee assumed the risk

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of conditions which the common council might legitimately impose, or had imposed. Under this lease the rule of *caveat emptor* applies, and the defendant has no ground of complaint against his landlord for the condition of the building, or failure to comply with the requirements of the common council. It is proper, and just, also, to here remark that the plaintiff had substantially complied with all the requirements of the common council under their resolution and ordinance of February, 1904, except as to the sprinkler and the hose in the main floor and in the balcony.

2. We have substantially decided the second question presented in what has already been said upon the first, and but little need be said upon it. That question is, Did the lessor in this case impliedly warrant that the premises were tenantable and could be safely and conveniently used for the purposes for which they were rented? That question has been settled by the decisions of this court, holding that such lease contains no implied covenant as to the condition of the demised premises or their fitness for the use intended. *Clark* v. *Babcock*, 23 Mich. 164, and authorities cited in note 3; *Rhoades* v. *Seidel*, 139 Mich. 608 (102 N. W. 1025); *Hart* v. *Windsor*, *supra*; *Auer* v. *Vahl*, 129 Wis. 635 (109 N. W. 529). In *Hart* v. *Windsor*, the defense was that the tenement was not reasonably fit for use, being infested with noxious insects. After stating the rule that there was no implication by law that the demised property was fit for the purpose for which it was let, the court say:

> "It is much better to leave the parties in every case to protect their interests themselves by proper stipulation, and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning."

Other English authorities are to the same effect, but we need not cite them. The same rule is held in the courts of the United States. Mr. Justice Gray, in *Leavitt* v. *Fletcher*, 10 Allen (Mass.), 119, said:

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"It is well settled that in a lease of real estate no covenant is implied that the lessor shall keep the premises in repair, or otherwise fit for occupation."

So it is distinctly held in *Jaffe* v. *Harteau*, 56 N. Y. 398 (15 Am. Rep. 438), that, in the absence of fraud or any agreement, there is no implied warranty that the premises are tenantable or fit for the use for which they are to be leased, citing several authorities. In *Keates* v. *Earl of Cadogan*, 10 Com. B. (N. S.) 591, the declaration stated that the demised premises were at the time of letting in a ruinous and dangerous condition, and the plaintiff was without any knowledge or information upon this subject, and that the defendant, the landlord, let the house to plaintiff without informing him of its condition. Upon demurrer the court said:

"It is not pretended that there was any warranty, express or implied, that the house was fit for immediate occupation, but it is said that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz., make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit; it was a mere ordinary transaction of letting and hiring."

Same holding in *Bowe* v. *Hunking*, 135 Mass. 380 (46 Am. Rep. 471); *Bennett* v. *Sullivan*, 100 Me. 118 (60 Atl. 886); *Doyle* v. *Railway Co.*, 147 U. S. 413 (13 Sup. Ct. 333). The well-nigh universal rule is that, in the absence of fraud or misrepresentation, the tenant takes the property as he finds it, and assumes all risk of its being fit for the purpose for which he rents it. We will not multiply authorities.

3. As between the plaintiff and defendant, lessor and lessee, no obligation rested upon the plaintiff to make the

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extensive improvements directed by the common council. *Cooper* v. *Lawson*, 139 Mich. 628 (103 N. W. 168). The fact, however, that he voluntarily did undertake to make them did not operate to change the terms of the original lease, and impose upon him the obligation which was not imposed by the lease. *Watson* v. *Almirall*, 61 App. Div. (N. Y.) 429 (70 N. Y. Supp. 662).

Under the defendant's own showing, I do not think he is entitled to recover, even if the obligation had rested upon the plaintiff to comply with the resolutions of the council. He had complied with nearly all of them. The defendant was compelled to admit that he abandoned the premises because the sprinkler plant was not installed in the basement, and because the hose were not in the main floor and the balcony of the Auditorium. These were the sole causes for complaint. He knew or might have known that the sprinkler system was nearly completed, for he had access to the building, and testified that he was there some days before the abandonment. When the common council insisted on these improvements being made, Mr. Norris used due diligence to secure them. The theatrical season was practically ended, and no serious harm would result if the sprinkler plant had not been installed immediately. He had also let a contract to put in the hose, and it was not his fault that the contract had not been complied with. The contract shows that this improvement was shortly to be made. He had suffered no loss in the past, or, if he had, his remedy was by action to recover damages. As to the future, the improvements were so nearly completed as to remove all ground for any claim to an eviction. An eviction, however, must be grounded upon the violation of some duty of the landlord, and not of strangers or trespassers. Plaintiff was not responsible for placing policemen in the hall during plays. (The record does not show how many were in the hall, or how conspicuous they were, or how often they were present; neither does it show that patrons would understand that they were present to act in case of fire.) He did not

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request such action by the council or give approval of it. He was in no sense a party to it. So far as this record appears, the appearance of policemen is the only act which might tend to interfere with the attendance at entertainments. But there is no evidence that it did interfere.

I think the case should be affirmed.

DETROIT TRUST CO. *v.* DETROIT, FLINT & SAGINAW RAILWAY.

1. RAILROADS—MECHANICS' LIENS—STATUTES.
   A manufacturer who furnishes machinery for the power plant of an electric railway is not entitled to a mechanics' lien under 3 Comp. Laws, § 10710; Act No. 17, Pub. Acts 1903.

2. SAME—STATUTES—CONSTRUCTION—MORTGAGES — BONDHOLDERS' RIGHTS—WORDS AND PHRASES.
   The provisions of 2 Comp. Laws, § 6336, that the vendor and vendee of railroad equipment or rolling stock may provide by agreement for reservation of title to the property, should be construed in connection with 2 Comp. Laws, § 6426, by which after-acquired property becomes subject to a prior mortgage upon the rolling stock and equipments and other property, and the phrase "rolling stock and equipments" in the one section has the same meaning as "equipment or rolling stock" in the other; and the statutes so construed make a trust mortgage on the entire property a prior lien upon machinery furnished for the railway power house, over the rights of such vendor under a contract reserving title.

3. FRAUD—TRUST MORTGAGES—BONDHOLDERS' RIGHTS—PLEDGE.
   The holders of bonds of a corporation as security for materials furnished in constructing an electric railway are not precluded from sharing in the proceeds of such bonds on the foreclosure of the trust mortgage because they procured the bonds under a fraudulent statement of the purchase price in

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collusion with the contractors, to whom they intended to allow a secret rebate, but may participate in the division of the proceeds to the extent of their equitable claim.

Appeal from Genesee; Wisner, J. Submitted October 8, 1909. (Docket No. 24.) Decided December 31, 1909.

Bill by the Detroit Trust Company, trustee, against the Detroit, Flint & Saginaw Railway, the Praether Engineering Company, J. H. Kusell, trustee, and the Harrisburg Foundry & Machine Works for the foreclosure of a mortgage. Defendants Praether Engineering Company, J. H. Kusell, trustee, and the Harrisburg Foundry & Machine Works filed answers in the nature of cross-bills to enforce mechanics' liens. From a decree for complainants, and dismissing the cross-bills, said defendants appeal. Modified and affirmed.

Rundell & Stockton (*Edwin Henderson*, of counsel), for complainant.

Keena Lightner & Oxtoby and *Carton & Bray*, for defendants Praether Engineering Co. and J. H. Kusell, trustee.

Hunt & Altland, for appellant Harrisburg Foundry & Machine Works.

Brown, Farley & Selby, for defendant Detroit, Flint & Saginaw Railway.

BLAIR, C. J. The Detroit, Flint & Saginaw Railway, a Michigan corporation, organized for the purpose of building and equipping an electrical railroad from the city of Saginaw, in Saginaw county, to the city of Flint, in Genesee county, by the way of Bridgeport, and a spur from there to the village of Frankenmuth, for the purpose of financing the project, on the 13th day of January, 1904, gave a trust mortgage to the complainant, the Detroit Trust Company, as trustee, to secure the issue of bonds to the extent of $1,000,000. The mortgage covered

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all property then owned or that might thereafter be acquired, including franchises, etc. The road was only completed as far as Frankenmuth, a distance of some 12 or 13 miles, and bonds to the extent of $410,500 in all were issued and disposed of by the company, as follows: There were $130,000 of these bonds issued on February 16, 1904; $18,000 on May 25, 1904; $18,000 on July 14, 1904; $9,500 on October 6, 1904; $95,000 on December 1, 1904; $30,000 on May 31, 1905; $60,000 on October 19, 1905; and $50,000 on October 19, 1905—making a total of bonds issued of $410,500.

On October 25, 1904, a contract was made between the Reisinger-Praether Company (a copartnership composed of H. W. Reisinger, H. B. Praether, and A. G. McConnell), and the Detroit, Flint & Saginaw Railway, for the erection of a power plant for the railway company, at Bridgeport, Mich. This contract provided that the Reisinger-Praether Company was to receive for the building of the power plant and installation of machinery the cost of the same plus 10 per cent. of such cost. The contract contained the following provisions:

"All material to remain the property of the party of the first part until paid for in full in cash, or in part cash and part bonds of this railway company, as agreed on in writing between the parties to this contract prior to placing subcontracts or starting work, and as hereinbefore specified."

On the same day, the railway company and two of its officers and directors individually entered into a security agreement with the Reisinger-Praether Company—

"To set aside, and do hereby authorize and empower our trustee, the Detroit Trust Company of Detroit, Mich., to set aside bonds of the Detroit, Flint & Saginaw Railway Company. * * * Said bonds to be held in escrow for you, and said bonds to become your absolute property in one and one-half times the amount of each note in case of default of cash payment at maturity of each respective note, with full power and authority on your part upon such default being made to withdraw from escrow one and one-half times the amount of each note in default

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without recourse on our part therefor or for any part thereof. And we, the undersigned, now directors and stockholders of said railway company, as additional security for the payment of said notes as they respectively fall due, hereby, in consideration of the acceptance by you of said contract, agree and bind ourselves individually to indorse said notes as the same may be issued upon presentation of same to us, and upon failure on part of the drawer of the same to pay each note at maturity thereof, whether the same be protested or not, we hereby guarantee the payment of the same, and upon payment by us of said note or notes you are to deliver to us of such bonds to one and one-half times the amount of each respective note as may be in your hands, or authorize the said trustee in writing to issue the same to us as evidence of payment on our part of each respective note when paid."

Under this security agreement, bonds to the amount of $84,000 were deposited with the trust company from time to time during the progress of the work. On March 14, 1906, the Praether Engineering Company, assignee of the Reisinger-Praether Company, authorized the trust company to deliver $15,000 of these bonds to T. G. Sullivan, for which he paid $9,872.65. On the 29th day of May, 1903, the Harrisburg Foundry & Machine Works entered into a contract with the Reisinger-Praether Company, whereby the Harrisburg Company, as party of the first part, granted to the Reisinger-Praether Company, as party of the second part, "the exclusive right and privilege to sell the engines of the various patterns manufactured by them" in certain territory, including Michigan.

"The said party of the first part further agrees to furnish the engines to be sold by the said parties of the second part at their agent's prices, as the same may be from time to time changed and modified, and to give the said parties of the second part at least thirty (30) days' notice of any change that may occur in prices, the said parties of the first part to receive an additional sum for said engines equal to 25 % of the profits in each sale beyond the agent's prices as may be determined by the statement or memorandum furnished by the second party with each contract

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placed for machinery, except in such cases where the machinery ordered from the party of the first part shall be a part of an installation of a complete power plant and the same is included in the general estimate, in which case the proportion of profits paid by the second party in excess of agent's prices shall be on a basis of 25% of 10% of the profits on said machinery furnished by the party of the first part."

On November 16, 1904, the Harrisburg Company delivered to the Reisinger-Praether Company a proposal, portions of which are as follows:

"Specifications for Two Fleming Standard Tandem Compound Engines for Direct Connection to 250 K. W. Railway Generators, for the Detroit, Flint & Saginaw Railway.

"To REISINGER-PRAETHER COMPANY,
"Pittsburg, Pa.

"*Dear Sirs:* It gives us pleasure to herewith submit for your kind consideration and acceptance the following proposition for furnishing you with machinery, as manufactured by the Harrisburg Foundry & Machine Works, Harrisburg, Pa., and such other work as hereinafter specified.

"We propose and agree to furnish you * * *. The title to this machinery shall not vest in the purchaser until it is fully paid for. * * * If notes are accepted, the title to said machinery shall not pass from us until such notes, and all extensions and renewals thereof, shall have been paid. * * * The taking of security other than provided for shall not operate as a waiver of our statutory lien, and consent is given that we may, without notice, accept security, and thereafter increase, diminish, exchange, or release the same. * * * We agree to furnish the materials and work herein specified for the sum of eleven thousand six hundred fifty dollars ($11,650.00). * * * This proposal to be void unless accepted and returned on or before January 16, 1905, and is not to become binding on the Harrisburg Foundry & Machine Works until acknowledged by them at their general office at Harrisburg, Pa.

"Respectfully submitted,
"HARRISBURG FOUNDRY & MACHINE WKS.,
"By H. W. REISINGER.

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"The within proposal is hereby accepted this 30th day of December, 1904, and we hereby agree that the title to the property mentioned herein shall be and remain in the Harrisburg Foundry & Machine Works until the same shall be fully paid for. Further, upon default being made in any of the payments of the contract price of said machinery, that the said, the Harrisburg Foundry & Machine Works, are hereby given the right to enter the premises where the said machinery may be and remove the same as their personal property, without any liability whatever therefor, or for payments previously made. * * *

[Signed] "REISINGER-PRAETHER CO.,
"By H. B. PRAETHER.

"Witness:———.

"January 5, 1905. The foregoing proposal and acceptance are hereby acknowledged and accepted by the Harrisburg Foundry & Machine Works at general office, Harrisburg, Pa.

"DAVID FLEMING, Vice Prest.
[Seal.] "Attest: ABRAM L. GROFF, Secretary."

October 26, 1905, the Reisinger-Praether Company transferred its business to the Praether Engineering Company, including the contract with the Detroit, Flint & Saginaw Railway Company, reserving, amongst other things:

"Contracts reserved and which do not pass under this agreement and bill of sale, the same having been assigned and transferred to H. W. Reisinger. (A) Selling contract between the Harrisburg Foundry & Machine Works and Horace W. Reisinger, H. B. Praether, and A. G. McConnell, dated May 29, A. D. 1903."

The Reisinger-Praether Company, in the construction of the power plant, purchased all of the material used from subcontractors. The plant was completed some time in November or December, 1905, and accepted by the railway company, which gave its notes for the amount due, upon which there remains due, exclusive of interest, the sum of $53,575.90. The Harrisburg Company invoiced the engines to the Reisinger-Praether Company at $11,650, and the railway company gave its notes on the basis of

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this invoice price. The engines did not actually cost the Reisinger-Praether Company $11,650; but, by a secret agreement with the Harrisburg Company, they were entitled to a rebate of at least $1,139.60. On June 21, 1906, the creditors of the Reisinger-Praether Company, including the Harrisburg Company, agreed that—

"Mr. J. H. Kusell shall act for us in an advisory capacity. * * * It being understood that the amount due from the Detroit, Flint & Saginaw Railway is not to be settled for any sum less than the full amount of the claim of the Praether Engineering Company, without first being submitted to us and our consent in writing given thereto."

On the 7th day of July, 1906, the Praether Engineering Company assigned all of its interest in its claim against the Detroit, Flint & Saginaw Railway Company, including its claimed mechanics' and vendors' liens, in trust for the following parties and the amounts due each, viz.:

The Dime Savings & Banking Co	$10,429.40
The National Electric Co.	7,261.09
Aultman & Taylor Co.	10,550.82
The Harrisburg Foundry & M. Wks.	10,393.51
F. C. Werk	2,819.88
Am. Foundry & Cons. Co.	5,327.72
Henry R. Worthington	405.91

On December 22, 1906, the creditors named in said agreement of July 7th entered into another agreement, wherein it was agreed:

"*First.* That in the execution of the said trust of July 7, 1906, the claim of the Dime Savings & Banking Company, as to which they are to have a preference over and above said other creditors, shall be and is hereby stated to be the sum of ten thousand seven hundred and sixteen dollars and twenty-two cents ($10,716.22), and that as to any other claims it may have against said Praether Engineering Company, it shall be entitled to the benefit of the securities held by said trustee, after the claims of said other creditors shall have been fully paid, principal and interest.

"*Second.* That in the execution of said trust after the

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payment of said ten thousand seven hundred and sixteen dollars and twenty-two cents ($10,716.22) to said Dime Savings & Banking Company, the said claims as hereinbefore stated of other creditors shall be paid in full if the avails of said trust shall be sufficient for that purpose, and if not sufficient the same shall be divided among said other creditors *pro rata.*"

On January 9, 1906, the Praether Engineering Company filed a claim of mechanic's lien for $59,456.53. On March 10, 1906, the Praether Engineering Company filed in the office of the secretary of State the contract between the Reisinger-Praether Company and the railway company. On March 10, 1906, the Harrisburg Foundry & Machine Works filed its claim of mechanic's lien for $10,997.40, and on June 5, 1906, it filed in the office of the secretary of State a copy of its contract of January 5, 1905, with the Reisinger-Praether Company. On the 20th day of November, 1906, the railway company, having become insolvent and having defaulted upon its bonds, the complainant filed its bill in the court below for the purpose of foreclosing the mortgage and selling the assets of the company. The Praether Engineering Company and the Harrisburg Company, after the failure of certain special proceedings (see *Hogan* v. *Railway*, 140 Mich. 101 [103 N. W. 543], 148 Mich. 283 [111 N. W. 765], 154 Mich. 478 [118 N. W. 140]), filed answers in the nature of cross-bills, to which complainant filed answers. The Harrisburg Foundry & Machine Works alleged in its cross-bill, among other things:

"That this defendant is informed and believes that said engines and machinery are so related to the operation of said defendant railway that waste would be committed if said engines should be removed from said power house; that it is to the interest of this railway property that the said engines should be kept intact in said power house."

The relief asked for was: That defendant be paid its claim; that in default of such payment it be decreed to have a vendor's lien; that in the event of a decree to sell

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the property as an entirety it be paid first; that, if it should be deemed inequitable that it should be paid first, that it should be decreed to have a statutory mechanic's lien; that its lien upon the premises be decreed to be a prior and superior lien.

The cross-bill of the Praether Engineering Company and J. H. Kusell, trustee, contained the following allegation:

"That these defendants are informed and believe that said engines and machinery are so related to the operation of said defendant railway that waste would be committed if said engines should be removed from said power house; that it is to the interest of said railway property that the said engines should be kept intact in said power house."

As part of the relief asked for, the cross-bill prayed for a vendor's lien, a mechanic's lien, the property be sold as an entirety, and—

"That in case this court, by its decree, provides for a sale of the assets of said railway company, including the said power house and the engines and machinery therein contained, the said decree shall provide that out of the proceeds thereof there shall be first paid to these defendants the amount of their lien, or such reasonable part thereof as these defendants may be entitled to and as may be in accordance with equity. Or that, in lieu thereof, it be decreed that these defendants have title to the machinery, boilers, engines, and other property which were placed upon said real estate, in pursuance with the contract shown in Exhibit A hereto annexed; and that these defendants be permitted, by an order of this court, to remove them or such portion thereof as may not have become affixed to, and become a part of, the real estate. That said Detroit Trust Company be decreed to be the holder of the $69,000 in par value, of bonds set forth in paragraph 3 herein, for the use and benefit of these defendants, and that the same be applied, as far as may be necessary, to the payment of the amount due these defendants; and that, as to the amount of said bonds, these defendants be decreed to have a prior lien, under said trust mortgage, to the other parties to this suit and to the claims of other holders of bonds under said mortgage."

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Early in the course of the trial, the following occurred, with reference to the manner in which the engines were attached to the realty:

"*The Court:* I understand it to be the claim from the start in this case—I have not read the pleadings—but it has been the claim here, and I suppose the pleadings must cover the proposition, that it would claim that this property was so attached to the freehold there that it could not be severed, and that a lien would not attach. That must have put you on your guard about your witnesses.

"*Mr. L'Esperance:* Assuming that, for the purpose of argument, if the court please, I think when it comes down to an argument on that proposition that we can show to the court that the law, as construed by our court in this State and in the various States in the country and the United States court, it is held that the mere fact that the property is so attached, personal property is so attached to the realty, as to become a part, it does not in any respect deprive the vendors of that lien to which he is entitled.

"*The Court:* I did not make any decision on that proposition. I am simply calling your attention to the propositions that were in the case.

"*Mr. L'Esperance:* We are prepared to meet that and admit that the property is (take this on the record), admit that the engines are so attached to the realty, so attached to that power house station, as to become a fixture there."

At the close of the case, the following occurred:

"*Mr. L'Esperance:* I wish to withdraw from the record in view of the examination of Mr. Woodford and Mr. Zerfoss in reference to the manner in which this property is attached to the premises, by myself, on cross-examination by the gentlemen on the other side, my statements that these engines were so attached to the power house as to become a fixture. The question as to whether it is or is not a fixture is purely and simply a question of intention.

* * *

"*The Court:* I will have to consider it. I won't permit its withdrawal. I will have to consider the concession with view of the withdrawal, having been made after all the witnesses are excused and the case closed."

Much testimony was taken in open court, and the court

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entered a decree of foreclosure. The decree established the mortgage as a prior lien to all other liens or interests of whatsoever nature, ordered the property sold as an entirety, found that the defendants Praether Engineering Company, J. H. Kusell, and Harrisburg Foundry & Machine Works had no valid liens, that the bonds held in trust under the security agreement were obtained by fraud and deceit and should be canceled, and denied to the appealing defendants any right to share in the proceeds of the foreclosure sale.

"* * * But it is also the intention of the court by this decree to leave to the said Praether Engineering Company, J. H. Kusell, trustee, and Harrisburg Foundry & Machine Works the rights to bring action or suit at law against the defendant, Detroit, Flint & Saginaw Railway Company, to recover the value of the machinery and appliances furnished by said parties to said Detroit, Flint & Saginaw Railway Company."

From this decree, the defendants Praether Engineering Company, Harrisburg Foundry & Machine Works, and J. H. Kusell, trustee, have appealed to this court.

The important question which presents itself for our consideration at the threshold of the case is that which concerns the validity of the liens claimed by the appellants. The bonded indebtedness secured by the mortgage, exclusive of the $69,000 in escrow, was much greater than the total value of the railway company's assets, and it is apparent that, unless the appellants, by virtue of their claimed liens, had acquired interests superior to those of the mortgages, they have no standing to question the decree, except as to their claimed right to share in the proceeds of the sale to the extent of the $69,000 of bonds. The validity of the claimed mechanics' liens, apart from questions of procedure, depends upon the construction of our statute providing for such liens. See 3 Comp. Laws, § 10710, as amended (Act No. 17, Pub. Acts 1903). This statute came under the consideration of the United States circuit court of appeals, sixth circuit, on appeal from the decree of

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the circuit court for the eastern district of Michigan, in the case of *Pennsylvania Steel Co.* v. *Lumber Co.*, 63 Fed. 11, 11 C. C. A. 11. The eminent judges who constituted the court, after much consideration and examination of authorities, reached the conclusion that the statute was not intended to give a lien for the materials used in the construction of a railroad. We are satisfied that the court correctly interpreted our statute, so far as concerns materials furnished to become an integral and permanent part of the railway system, and that the property upon which the mechanics' liens are claimed in the instant case is as much outside of the statute as the rails in the case referred to. *Phœnix Iron Works Co.* v. *Trust Co.*, 83 Fed. 757, 28 C. C. A. 76, and cases cited; *Detroit United Ry.* v. *State Tax Com'rs*, 136 Mich. 96 (98 N. W. 997).

The Vendors' Liens or Conditional Sales. Section 35 of the train railway act, under which the Detroit, Flint & Saginaw Railway was organized (2 Comp. Laws, § 6426), provides as follows:

"It shall be lawful for any corporation or association organized under the act hereby amended, for the purpose of building and operating street railways, to borrow money for the purpose of constructing and operating the road or roads proposed to be constructed by them, and for that purpose to mortgage, or create any other lien upon their franchise, road, superstructure-fixtures, rolling stock and equipments; and whenever such corporation or association shall have acquired a simple easement or right of way for its proposed road, or any part thereof, and shall have made and filed its articles of association in conformity to the provisions of the act hereby amended, any mortgage or mortgages executed by such corporation or association, upon the route or routes where such easement or right of way has been obtained, as aforesaid, shall be a legal and valid lien upon the right of way so obtained, to the entire extent of the interest of such corporation or association therein, and upon the superstructure and fixtures upon such route or routes, whether the same shall be built before or after, or partly before and partly after, such mortgaging, and any such mortgage shall be deemed to be a mortgage upon real estate."

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It will be observed that the section authorizes a mortgage upon the "franchise, road, superstructure fixtures, rolling stock and equipments," and, in case the company has only acquired a right of way, makes the mortgage a valid lien upon the right of way and upon the superstructure and fixtures afterwards constructed thereon, and declares such mortgage to be a real estate mortgage.

The mortgage in this case expressly subjected after-acquired property to its lien; but, regardless of this provision, the statute quoted subjected the power plant to the lien of the mortgage, provided the same constituted superstructure or fixtures within the meaning of the statute. Under the pleadings, the concession of counsel, and the testimony in the case, the property in question must be deemed to be fixtures, unless such conclusion is negatived by the agreements retaining title. Leaving out of consideration, for the present, the statute relative to conditional sales (2 Comp. Laws, § 6336), and the admissions of the pleadings and of counsel, we deem it settled by authority that the property in question constituted fixtures, and that the lien of the mortgage was superior to titles subsequently reserved in the contracts for furnishing materials. *Phœnix Iron Works Co.* v. *Trust Co.*, *supra; Porter* v. *Steel Co.*, 120 U. S. 649 (7 Sup. Ct. 741), 122 U. S. 267 (7 Sup. Ct. 1206); *Toledo, etc., R. Co.* v. *Hamilton*, 134 U. S. 296 (10 Sup. Ct. 546); *Wickes Bros.* v. *Hill*, 115 Mich. 333 (73 N. W. 375); *Detroit United Ry.* v. *State Tax Com'rs*, *supra; Watson* v. *Alberts*, 120 Mich. 508 (79 N. W. 1048); *Hunt* v. *Iron Co.*, 97 Mass. 279; *Bass Foundry & Machine Works* v. *Gallentine*, 99 Ind. 525; *Lake Shore, etc., R. Co.* v. *City of Grand Rapids*, 102 Mich. 374 (60 N. W. 767, 29 L. R. A. 195).

In *Wickes Bros.* v. *Hill*, *supra*, it is said:

"When, however, the vendor sells machinery which it is well understood may, and in the absence of agreement does, become part of the realty by being so attached that it cannot be removed without injury, and thereby places

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it in the power of his vendee to so attach it and sell or mortgage to innocent third parties, the better and more just rule is that he must suffer."

In support of this conclusion, the court cite, among other cases, *Porter* v. *Steel Co.*, *Hunt* v. *Iron Co.*, and *Brass Foundry & Machine Works* v. *Gallentine*, *supra*, which were cases where the property sold with reservation of title was to be annexed to real estate covered by a prior mortgage.

In *Porter* v. *Steel Co.*, 122 U. S. 267 (7 Sup. Ct. 1206), it is said:

"It is claimed on behalf of the Smith Bridge Company, that the contracts between it and the railway company, for the construction of the bridges, provided that the bridges should remain the property of the Smith Bridge Company until the contract price for them should have been fully paid, and that, in default of such payment, the Smith Bridge Company should have the right to remove the bridges and bridge material; that the mortgages became a lien on the bridges only as the bridges became the rightful and legal property of the railway company; that Porter, before he purchased the bonds, had notice of the equities of the Smith Bridge Company growing out of their contracts; and that the First National Bank of Chicago had like notice before it acquired any interest in the bonds. The contracts of the Smith Bridge Company were made in October, 1882, and in July, 1883. The bonds were pledged to Dull and McCormick in January, 1882, and passed from them to Drexel, Morgan & Co. in January, 1883. The bridges became a part of the permanent structure of the railroad, as much so as the rails laid upon the bridges or upon the railroad outside of the bridges. Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage, will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations

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like those in the contracts in the present case. *Dunham* v. *Railway Co.*, 1 Wall. (U. S.) 254; *Galveston R. R.* v. *Cowdrey*, 11 Wall. (U. S.) 459, 480, 482; *United States* v. *Railroad*, 12 Wall. (U. S.) 362, 365; *Dillon* v. *Barnard*, 21 Wall. (U. S.) 430, 440; *Fosdick* v. *Schall*, 99 U. S. 235, 251."

In *Hunt* v. *Iron Co.*, 97 Mass. 279, it is said:

"Nor do we suppose that a mortgagor in possession is competent to bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold. The legal character of the rails, when once laid down, is determined by the law to be that of real estate. Mortgagees, as well as all other parties in interest, are entitled to the benefit of this rule of law, which can be taken from them only by their own waiver."

Considering the authorities in the light of the statute, we hold that mortgages given in accordance with the statute are not affected by reservations of title in subsequent contracts for furnishing materials, which when attached, except for such reservations, would become fixtures subject to the mortgage, unless subjected to the vendor's rights by section 6336, 2 Comp. Laws. That section provides:

"That in any contract for the sale of railroad or street railway equipment or rolling stock, it shall be lawful to agree that the title to the property sold or contracted to be sold, although possession thereof may be delivered immediately, or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase money," etc.

The act containing this section was adopted after the adoption of the section of the train railway act previously quoted, and may properly be construed in connection with it. Considering the two acts together, we are satisfied that the words "equipment or rolling stock," in the one, have the same meaning as "rolling stock and equipments," in the other. It appears reasonably clear that in section 6426 "rolling stock and equipments" are distinguished

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and differentiated from the franchise, road, superstructure, and fixtures, which, when the company shall have acquired a right of way, are subjected to the mortgage, "whether the same shall be built before or after," etc. By "rolling stock and equipments," as used in this section, we understand reference is made to the locomotives, cars, furniture, and other loose and movable personal property, as distinguished from the permanent fixed property forming an integral and essential part of the railway as an entirety. We see no reason for giving any different meaning to the same words as used in section 6336, and are therefore of the opinion that that section does not support the appellant's position.

It remains only to consider whether the appellants were entitled to share in the proceeds of the sale to the extent of the bonds held in trust under the security agreement, participation in which was denied them by the circuit court, because, among other grounds therefor as found by him, the bonds were obtained by fraud and deceit in swelling the cost of constructing the plant which formed the basis for the deposit of the bonds.

The question of fraud was the principal question of fact to which the testimony was directed, and much testimony was put in upon that subject. It would extend this opinion to an inordinate length if we should undertake to review the testimony bearing upon this question. We therefore content ourselves with a brief statement of our conclusions reached after a careful examination of the entire record. It is undisputed that the bills for construction furnished to the railway company by the Reisinger-Praether Company were largely in excess of the actual cost, upon which their profit of 10 per cent. was to be computed, and that the amount of this excess was not specifically shown to the court. It is also undisputed that the Harrisburg Company laid the foundation for a successful perpetration of the fraud, by furnishing an invoice to the Reisinger-Praether Company, which stated the cost of the engines at a sum largely in excess of the actual

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cost to the Reisinger-Praether Company. It is strenuously contended, however, that the Harrisburg Company had no contractual relations whatever with the railway, that the transaction with the Reisinger-Praether Company was the ordinary transaction of purchase and sale, and that it owed no duty to the railway company. It is also contended that there is no evidence of any fraud on the part of the Harrisburg Company, or of knowledge on its part of the terms of the contract between the railway company and the Reisinger-Praether Company as to the compensation to be paid. It would be unreasonable to suppose that the Harrisburg Company was making the contract with the Reisinger-Praether Company in ignorance of the terms of their contract with the railway, when the profit of the Harrisburg Company depended in part upon the profits of the Reisinger-Praether Company beyond the agent's prices. Furthermore, Mr. Reisinger testified that, at the time the contract was forwarded to the Harrisburg Company for its approval—

"We made them a statement showing the net cost, plus our profit, showing the amount of the contract. * * *

"*Q.* And you gave them to understand that in furnishing the engines they could receive the agent's price and 25 per cent. of this profit which you added?

"*A.* Yes, sir."

We are entirely satisfied, from the nature of the transaction, the relations of the parties, the contract between them, the testimony of Mr. Reisinger, and the surrounding facts and circumstances disclosed by the record, that the Harrisburg Company sold the engines, through its agent and representative, to the Reisinger-Praether Company for the railway company with full knowledge of the terms of the contract with the railway company, and stated a false price in their invoice, with the fraudulent purpose of swelling the profits of the Reisinger-Praether Company and of themselves. We have concluded, however, although not without some hesitation, that the appellants are entitled to have the benefit of that maxim of

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equity jurisprudence that he who asks equity must do equity. Although appellants have not shown the exact amount to which they are equitably entitled, the evidence indicates that the increase over the contract price was not much in excess of 10 per cent., and we do not think that it would be equitable to punish them by the forfeiture of the entire amount of their claim, provided the amount equitably due them can be limited, with the reasonable assurance that such limitation will not afford them compensation beyond what would be justly due under the contract.

We are satisfied that a deduction of 20 per cent. from the prices made to the railway company will sufficiently protect the rights of all parties. If, however, complainant is not satisfied with such deduction, a reference may be had to the court or a circuit court commissioner for the determination of the amount thereof.

We are therefore of the opinion that the parties entitled to the benefit of the security agreement should have the right to participate in the proceeds of the mortgage sale, in the proportion which the bonds to which they would have been entitled on the basis of their reduced claim bear to the total of the bonds actually issued and secured by the mortgage.

The decree appealed from may be modified in conformity with this opinion, and, as so modified, is affirmed, with costs of this court to appellants.

GRANT, MONTGOMERY, OSTRANDER, and HOOKER, JJ., concurred.

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MOORE *v.* WHITE.

1. EASEMENTS—WAYS OF NECESSITY.
   The owner of a forty acre tract which is cut off from the highway by another forty acre parcel which was at one time held by a common grantor, has a way of necessity across the intervening parcel to such highway.

2. SAME.
   That the owner of the servient estate offered to sell a right of way across other lands owned by him in no way affects the easement.

3. SAME—STATUTES—PRIVATE ROADS.
   Such owner of the easement is not required to resort to the condemnation of a private road under 2 Comp. Laws, § 4142, *et seq.*

4. SAME—LOCATION OF WAY OF NECESSITY.
   Where the owner of the servient tenement refused to locate a right of way and the holder of the dominant estate chose a way which was reasonable, the court of equity will protect his rights.

5. SAME—EXTENT OF USER.
   One who claims a right of way by necessity over adjoining lands may make the way passable and is required to maintain necessary fences at either end and keep the road in repair.

Appeal from Cass; Des Voignes, J. Submitted October 13, 1909. (Docket No. 69.) Decided December 31, 1909.

Bill by Joel Moore against Nathan White and Ruth White to enjoin a trespass upon lands. From a decree for complainant, defendants appeal. Reversed, and decree entered for defendants.

Charles E. Sweet, for complainant.

M. L. Howell, for defendants.

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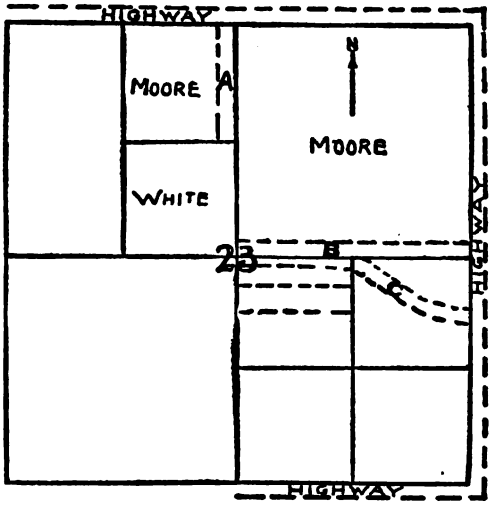
McALVAY, J. A bill was filed in the circuit court for Cass county by complainant against defendants to restrain them from entering upon and crossing his premises, and from tearing down fences for that purpose. It appears from the bill of complaint and answer that defendants claim a way of necessity over complainant's land. The facts are that a common grantor in the chain of title of the parties entered the lands which are situated on section 23, town 6 S., range 16 W. The description is the E. ½ of the N. W. ¼ of said section. This land was en-



A. Way claimed by defendants.
B. Way proposed by complainant.
C. Old way over which defendants moved in.

tered as one parcel in 1837 by John Collins. He sold the N. ½ to James Moore, complainant's ancestor, in 1846, and the S. ½ to George McCoy, defendant Ruth White's ancestor, in 1861. Both parties to this suit derived title directly from these grantees. There is a highway along the north line, and also one along the east line, of this section, and one along the E. ½ of the south line. No other highways are in or around the section. Complainant is also the owner of the entire N. E. ¼ of the section.

The accompanying diagram shows the situation.

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The land owned and occupied as a home by defendants is entirely surrounded by the lands of others, and it is admitted that they have no way of ingress or egress except over lands owned by others. They claim they have a way by necessity over the N. E. ¼ of the N. W. ¼ of this section, which is owned by complainant. When they moved upon the land they came by consent over the N. ½ of the S. E. ¼, which is now owned by several persons as indicated on the diagram. They moved a small house onto the land, coming in that way from the road along the east side of the section. Their 40 acres and complainant's 40 acres north of it were then, and yet remain, solid timber land, except some clearing on defendants' land, and the part of the S. E. ¼ over which they moved in was cleared, and defendant White, who as a tenant farmed part of the S. E. ¼ of this section for one or two years, went in and out over that land to the north and south road, and during the same time also went in and out through the woods on the north now belonging to complainant. It is not disputed but that the right to continue to go out over the lands toward the east was refused by the owners.

For several years the defendants have continuously crossed complainant's land, a part of the distance along the east line of the complainant's 40 acres directly north of them, and a part of the way over complainant's land next east of it. The record shows that on account of a low and wet place the east line cannot be followed all the way through. Complainant denies that defendants have a way of necessity or any right of way across these premises, and claims that they are trespassers. He was, and still is, willing to sell a right of way along the south line of the N. E. ¼ of the section. They have no claim to such a route, and declined to purchase, but at one time offered $60 for an acre of land along the line they claim, which was refused. Complainant has forbidden defendants from crossing any part of his land. He put up a wire fence which defendants tore open, so as to allow them to go out and in across this land. On petition, the

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highway commissioner laid out a highway through the center of the section north and south, which would give defendants an outlet. Complainant appealed to the town board, which reversed the action of the commissioner. Defendants have not sought to lay out a private road under the statute.

The case was heard upon pleadings and proofs, and a decree was granted complainant according to his prayer for relief. Defendants have appealed, and ask this court to reverse the decree, claiming that they have a way of necessity, created by implication, over the land lying north of their land, and which was entered with it as a single entry. That this way of necessity was created when there was a severance of this land-locked tract by the owner from the balance of his entry is also claimed. The record does not show that there has ever been an abandonment or waiver of this right claimed by defendants. Until recently these two parcels of land have been covered with standing timber. The number of years they have lived upon the land we do not discover, but one witness for complainant testified that for the first two years defendants occupied their land they were accustomed to go out over complainant's land while they were also using the way out to the east road. Another of his witnesses testified that there was no established road through there, but he had heard that a right of way was claimed. Complainant's son testified that they had gone that way continuously for four years by permission granted. There appears to have been no occasion for controversy while this wild land was open and unfenced. When, however, fences were built by complainant and torn down, and defendants failed to get a public highway and could not agree with complainant upon some adjustment, and insisted upon the right to cross complainant's land, this controversy readily arose.

The authorities, as far as we have examined them, support the proposition that, under circumstances similar to the one in the case at bar, a way of necessity arises in

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favor of the landlocked tract over the adjoining land of the owner. 23 Am. & Eng. Enc. Law (2d Ed.), p. 13, and notes. Such way, being one of strict necessity, is granted by implication, and under like circumstances will be reserved by implication. 14 Cyc. p. 1,172 *et seq.*, and notes and cases cited. A well-considered case in which this doctrine of the creation of ways of necessity by implication and reservation is discussed is *Miller* v. *Hoeschler*, 126 Wis. 263 (105 N. W. 790). It is reported and annotated exhaustively in 8 L. R. A. (N. S.) 327. The circumstances of the case at bar are such as bring it within the rule of strict necessity from which no authority examined dissents.

It was not necessary in this case for defendants to apply under the statute for the condemnation of a private road. If this way of necessity existed, it was a vested right which entitled defendants to this way over the land in question immediately north of their premises, and necessarily over no other land. The fact, therefore, that the complainant offered to sell a right of way over other land is not material. Complainant has absolutely refused to recognize any right whatever in defendants to an easement across this land. This way has never been located. The record shows that in former years plaintiff, in going out over this land, did not always follow the same path or road. This they had a right to do. No way had ever been defined. There were no fences or lines to indicate a located way. *Powers* v. *Harlow*, 53 Mich. 507, at page 513 (19 N. W. 257, 51 Am. Rep. 154).

Under present conditions, when lands are enclosed and premises used for pasture or otherwise, to allow defendants to go over the entire tract wherever they pleased would be inequitable. The right is held to be in the owner of the servient estate to locate such a way of necessity. He has refused to exercise this right and defendants have done so, and such location is not claimed to be an abuse of such right. It will not be necessary to cut a road through this timber or to fence it in. Defendants have a

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right to make it passable for the uses necessary to its full enjoyment, and nothing more. They must keep it in repair, and provide such gates at both ends as will prevent animals from straying in and complainant's stock from escaping from the premises. The owner of the fee is not prevented from using such way by passing to and fro over it; but such use must not in any way impair or conflict with the use of the way owner.

It follows that we conclude that defendants have by law a way of necessity over these premises, with which complainant may not interfere, and that the decree of the circuit court must be reversed, the injunction dissolved, and the bill dismissed, and that a decree be entered in this court in favor of defendants according to this opinion. That a way of necessity be declared in defendants along the line located by them, unless complainant, within 90 days after notice, by proper conveyence, grant and convey a perpetual way to defendants, their heirs, representatives, and assigns, 20 feet in width on the south side of the N. E. ¼ of said section, extending the full width thereof, giving free egress and ingress to defendants at all times from their land to the highway on the east, and that defendants will be required only to maintain gates at the ends of said road or way, and shall not be required to maintain gates elsewhere along the same, or fences on either side thereof; but such gates and fences, if considered necessary by complainant, his heirs, representatives, or assigns, shall be constructed and maintained by him or them; this condition and proviso being based upon the offer made by counsel for complainant upon the argument of the case. Defendants will recover costs of both courts.

BLAIR, C. J., and GRANT, MOORE, and BROOKE, JJ., concurred.

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BELCHER-STINE LUMBER CO. *v.* BURNS.

1. ATTACHMENT—SALE BY SHERIFF—SALES—CONTRACT TERMINATING SELLER'S LIEN.

   Trover lies for the conversion of lumber owned by the plaintiffs, seized in attachment against third parties, and sold by the sheriff without awaiting the levy of execution, the lumber having been transferred to plaintiffs by the purchasers who bought it subject to the terms of a contract which provided for a lien until notes of the purchasers were given; the evidence showing the execution of the stipulated notes.

2. SAME—AFFIDAVIT—PARTIES.

   An affidavit in attachment which describes the defendants named as a copartnership, when, in fact, one of them is not a member of the firm, is not so defective as to deprive the court of jurisdiction. MOORE, J., dissenting.

Error to Wayne; Brooke, J. Submitted October 22, 1909. (Docket No. 174.) Decided December 31, 1909.

Trover by the Belcher-Stine Lumber Company against James D. Burns, sheriff of Wayne county. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Harry M. Lau (*George M. Sayles*, of counsel), for appellant.

Bowen, Douglas, Whiting & Eaman (*Herbert V. Barbour*, of counsel), for appellee.

OSTRANDER, J. I do not think the record supports the conclusion that the attachment proceeding was void in the sense that it was a nullity, that the court had no jurisdiction, and that a judgment rendered therein would upon its face have been without force or effect.

The record discloses that the lumber which the defendant, as sheriff, took into his possession in executing the

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writ of attachment was sold by the sheriff at the instance of the plaintiffs in attachment, and the money turned over to said plaintiffs. It seems to me, therefore, that the question presented is this: Did the sheriff sell lumber which belonged to the plaintiffs? If not, he is not liable for its conversion. The plaintiffs in attachment had no contract with the plaintiff in this suit. Their contract was with the copartnership. That contract provided that the title to the lumber should pass to said copartners—

"As soon as the same is cut and piled in said millyard, subject only to lien of said first party for the purchase price of said lumber."

The record discloses that, as between the said copartnership and the plaintiff herein, it (the plaintiff) assumed the contracts of the copartnership, but without acquainting the owners of the lumber with the fact that a corporation had been formed. If the plaintiff owned the lumber in question, it is because title to it passed to it upon its delivery on board cars after it had paid for the same according to the terms of the contract. The contract provides:

"Terms of payment to be four months' note to be given upon rendering invoice for each 500 M. feet of lumber sawed."

It seems to be established, although the record is not very clear upon the subject, that notes of the plaintiff had been given for the particular lumber. I conclude, therefore, that the title to the lumber passed when the same was delivered on board cars and by the terms of the contract itself no lien remained with the former owners of the lumber. The lumber which the sheriff seized was the lumber of the plaintiff, and it had the right to maintain this action. I therefore concur in affirming the judgment of the court below.

GRANT, MONTGOMERY, and MCALVAY, JJ., concurred with OSTRANDER, J.

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MOORE, J. (*concurring*). From a judgment obtained in favor of the plaintiff the case is brought here by writ of error.

In June, 1905, a written contract was entered into between the Lewis Cornwell estate for the sale of lumber to Belcher-Stine Lumber Company, a partnership. The sale included all of the hemlock lumber cut at the mill of the Lewis Cornwell estate at Wolverine, Mich., during the season of 1905. The provisions of the contract important in this controversy read as follows:

"Terms of payment to be four months' note to be given upon rendering invoice for each 500 M. feet of lumber sawed. The invoice for the first one million feet, already sawed, to be rendered immediately and four months' note to be given for the same. All lumber to be measured by said first party when the same is placed upon cars, and invoice rendered therefor to second party. Said second party shall move said lumber promptly, as fast as the same is in shipping condition; sixty days from date of sawing being understood to be the length of time required for drying. The title to said lumber to pass to the party of the second part, as soon as the same is cut and piled in said millyard, subject only to lien of said first party for the purchase price of said lumber. Lumber is to be kept insured by party of the first part."

What occurred later is stated by the learned trial judge as follows:

"Under this contract the lumber was shipped to Belcher-Stine Lumber Company, a copartnership, and notes given, signed by Belcher-Stine Lumber Company by George B. Stine, until January, 1906, after which date notes given in payment were signed, 'The Belcher-Stine Lumber Co., by George B. Stine, Vice President,' or by 'F. S. Belcher, President.' The change in the signature of the notes given was due to the fact that a corporation had been formed, except that the notes called 'The Belcher-Stine Lumber Co.,' which corporation took over all the contracts of the Belcher-Stine Lumber Company, a copartnership. No notice was given to the Cornwell estate that a corporation had been formed, except that the notes were signed by the president or vice president when they had previ-

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ously been signed only by George B. Stine, and some of the letter paper used showed very plainly that a corporation had been formed, although after the formation of the corporation some letter heads of the old partnership were used. Lumber was shipped to the corporation for several months and the corporation notes accepted and paid. Finally, certain notes were allowed to go to protest, and on receipt of this notice the Cornwell estate immediately started an attachment suit in Detroit against the Belcher-Stine Lumber Company, a copartnership, and seized the two car loads of lumber in dispute in this case. The affidavit for the attachment described the copartnership as composed of Fred S. Belcher, George W. Belcher, and George B. Stine. Now, there was no such partnership in existence at this time, and no such person as George Belcher in existence. The Cornwell estate accounts for this mistake in the affidavit by showing that they made inquiries in Toledo, and were told that the partnership was composed of the men mentioned in the affidavit. The lumber seized belonged to the Belcher-Stine Lumber Company, an Ohio corporation, and was not the property of the partnership described in the affidavit for the attachment. After this lumber was seized a demand was made upon the sheriff who had taken a bond from the Cornwells, and the demand was refused. The suit (an action in trover) was then started to recover the value of the lumber from the sheriff. The lumber was appraised and sold for $344.32."

It is insisted on the part of the appellee that the attachment proceeding was void because of the defect in the affidavit. On the part of the appellant it is said that the defense, if any, growing out of this defect, was personal to the partnership and cannot inure to the benefit of the plaintiff in this suit. Section 10556, 3 Comp. Laws, provides what must be stated in the affidavit to entitle one to a writ of attachment. In *Estlow* v. *Hanna*, 75 Mich. 219 (42 N. W. 812), the court says:

"The affidavit is necessary to confer jurisdiction. * * * The remedy itself is a harsh and extraordinary one, proper when it comes within the plain provisions of the statute, but the statute should not be extended by construction"

There was no personal service and no general appear-

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ance of the defendant in the attachment case. In *Nugent* v. *Nugent*, 70 Mich. 52 (37 N. W. 706), it was held that, in an attachment proceeding against a nonresident defendant who does not appear, the proceeding may be attacked collaterally; citing *Granger* v. *Judge of Superior Court of Detroit*, 44 Mich. 384 (6 N. W. 848); *King* v. *Harrington*, 14 Mich. 532; *Millar* v. *Babcock*, 29 Mich. 526.

It is contended that, conceding the attachment proceedings are defective, plaintiff in the attachment case still had a lien against the property by reason of the contract which could be asserted. The trial judge was of the opinion that the lien was lost by the shipment of the lumber to the vendee. We need not decide whether this is correct, because the defendant in this case was doing what he did, not in an effort to enforce a lien, but as an officer proceeding by virtue of a writ of attachment. The record shows the property was appraised and sold by the defendant. It does not show that he sold the property by virtue of an order of the court.

In *Trowbridge* v. *Bullard*, 81 Mich. 451 (45 N. W. 1012), it was said:

"The office of the writ of attachment is to hold the property until the coming of an execution to enforce a judgment against the property of the debtor, so that the debtor may not put his property beyond the reach of such creditor when he shall obtain judgment. * * * The writ of attachment confers no right to sell the property except in special cases, when ordered by the court."

In *Terry* v. *Metevier*, 104 Mich. 50 (62 N. W. 164), which was an action of trover against a sheriff for the conversion of property which he had seized under a writ of attachment and sold without judicial sanction, the court says:

"It was the duty of the officer to hold the property until the coming of an execution to enforce the judgment in the case. He had no right to sell and dispose of the property without an order of the court, and that could be ob-

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tained only upon a special showing of necessity. Here he sold a portion of the property, and permitted the remainder to be removed beyond the jurisdiction of the court. This amounts to a conversion of the property.

The court in the above case quotes approvingly from *McGough* v. *Wellington*, 6 Allen (Mass.), 505, as follows:

"An officer who has a precept which authorizes him to take property may take it under and by virtue of his precept; or he may take it wrongfully to convert it to his own use. If, at the trial, he justifies under his precept, and has conducted himself strictly according to its requirements, he is protected, because he is then entitled to the conclusive presumption that he acted under his lawful authority. But if, before the trial, he has exceeded his lawful authority, the law presumes that the original taking was not for the purpose of serving his precept, but as a trespasser. The facts which occur after the suit is commenced do not constitute a cause of action, but are merely evidence from which arises the absolute presumption that his first taking was a trespass. The character of his original act is shown by his subsequent conduct. It is in the nature of an admission that he did not act under his precept, and such an admission is as effectual in proof if made at one time as at another. The cause of action is the original unlawful taking. That the original taking was unlawful is shown by his subsequent conduct."

Judgment is affirmed.

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GASKILL *v.* JACKSON CIRCUIT JUDGE.

MANDAMUS — DECREES IN EQUITY — ENFORCEMENT BY EXECUTION.

The entry of an order in circuit court requiring the issuance of an execution to collect the sum specified in a decree of the Supreme Court on accounting will be compelled by mandamus.

Mandamus by Mary H. Gaskill and others to compel James A. Parkinson, circuit judge of Jackson county, to order the issuance of an execution. Submitted December 14, 1909. (Calendar No. 23,642.) Writ granted December 31, 1909.

D. P. Sagendorph, for relators.

Wilson & Cobb, for respondent.

MCALVAY, J. Relators ask that a writ of mandamus issue against respondent requiring him to enter an order directing the register of the circuit court for Jackson county in chancery to issue an execution out of said court in favor of relators and against Eugene J. Weeks, Charles C. Bloomfield, and Thomas A. Wilson, executors and trustees, etc., defendants, remanded by this court to Jackson circuit court (*Gaskill* v. *Weeks*, 154 Mich. 223 [117 N. W. 647]), by a decree duly entered December 29, 1908. Later, a motion was made for a reformation and correction of said decree. This motion was denied. *Gaskill* v. *Weeks*, 156 Mich. 668 (121 N. W. 1133). Complainants having complied with the suggestions of this court as expressed in the opinion filed in the case last above cited, and having been paid their share of the cash and all costs, applied to the said circuit court for an execution against the defendants. Upon a hearing the court denied the motion to order an execution to issue. The

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amount to be distributed was found by the court to be $13,850.14. Of this amount complainants were found to be entitled to four-sevenths. "Such amount and none other" was fixed "as the basis of the distribution." We find no ambiguity in the decree and order above cited. No discussion is necessary. Complainant's construction is correct. He is entitled to an execution for four-sevenths of $13,850.14 less the amount already paid. The motion to order such execution to issue should have been granted.

A writ of mandamus will issue as prayed.

GRANT, MONTGOMERY, OSTRANDER, and BROOKE, JJ., concurred.

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JANUARY TERM, 1910.

In re CORNING'S ESTATE.

GLYNN *v.* CORNING.

WILLS — PROBATE — VENUE — JURISDICTION DEPENDENT ON RESIDENCE OF TESTATOR — PRIVATE INTERNATIONAL LAW — STATUTES.

The will of a person who is domiciled in another State at the time of his death must be admitted to probate in the State of the testator's domicile, before it can be admitted to probate here.

Error to Saginaw; Gage (William G.), J. Submitted October 20, 1909. (Docket No. 128.) Reargued January 4 and 5, 1910. Decided February 3, 1910.

Edward W. Glynn presented for probate the last will and testament of Edward Corning, deceased. The will was allowed in the probate court, and Anna Corning appealed to the circuit court. A judgment for proponent is reviewed by contestant on writ of error. Reversed.

G. W. Davis, for appellant.

Durand & Holland, for appellee.

OSTRANDER, J. Edward Corning died testate November 26, 1908, at Saginaw, Mich. His will was executed December 7, 1907, at Saginaw. He made his will after consulting counsel in Saginaw. His will recited:

"I, Edward Corning, born at the William Corning homestead in the village of Webster, Monroe county, State of New York, and taking my present residence from

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my brother's home, No. 150 East 47th street of the city of New York, State of New York, do make, publish, and declare this as and for my last will and testament."

The provision appointing the executors reads as follows:

"I hereby appoint my said sister, Anna Corning, and Thomas J. Swanton, of the said city of Rochester, N. Y., as my executors of this my will for the State of New York, and my sister, Anna Corning, and Edward W. GLYNN, of Saginaw, East Side, Michigan, as executors of this my last will for the State of Michigan."

After its execution, he deposited his will with his attorneys in Saginaw. After his death they gave the will to the executor, Glynn, who presented it for probate in the probate court of Saginaw county, Michigan. His coexecutrix, Anna Corning, objected to the probate of the will in this State for two reasons:

(1) "Because the deceased was a nonresident of the State of Michigan, and his domicile and home were in the State of New York at the time of the date of said will, and also at the time of his death."

(2) "The said deceased did not own any real or personal property which was at the time of his death located in the State of Michigan."

The probate court admitted the will to probate, holding that the deceased left property in Saginaw county, and that this fact gave the court jurisdiction. The contestant, Anna Corning, took an appeal to the circuit court, alleging the same reasons for her appeal. The evidence shows that Mr. Corning lived in Saginaw continuously for about a year previous to his death, and for about two months prior to the execution of the will. The evidence discloses that the deceased had property in Saginaw county, among which was a mortgage executed to him upon land in that county. The case was tried in the circuit court before a jury, to whom were submitted two special questions:

(1) Was Edward Corning at the time of his death an inhabitant of Saginaw county?

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(2) Did Edward Corning own any estate at the time of his death in Saginaw county?

To the first question the jury found that Mr. Corning was not an inhabitant of Saginaw county at the time of his death. To the second question they found that he did have property in Saginaw county at the time of his death. The court thereupon entered judgment confirming the probate of the will. No contest was made over the validity of the will.

The question presented is whether the will of a person domiciled in another State, who died leaving an estate within this State, may be admitted to probate here before its validity is established in a proceeding in the courts of the domicile of the testator. The precise point seems to be for the first time now presented for decision in this court. Like the most of the American States, Michigan has an elaborate and very complete system for the administration of estates of decedents. It is to the statutes and to certain general and universally recognized principles supporting local jurisdiction that we must look for an answer to the question. It may avoid confusion to point out, at the outset, that the jurisdiction of the courts of each State to determine the domicile of a testator is not involved. Such jurisdiction is admitted, or if it is not admitted, is, nevertheless, undoubted. And the right to administer the particular estate is not involved. There can be no doubt concerning the power of the probate court of Saginaw county to administer the estate of this decedent, found within the State, wherever the owner died and whether he did or did not leave a valid will. Whether in any case the effect of admitting a foreign will to be probated may amount to an estoppel, *inter partes*, is not a question presented. See, generally, *Robertson* v. *Pickrell*, 109 U. S. 608 (3 Sup. Ct. 407); *Overby* v. *Gordon*, 177 U. S. 214, 223 (20 Sup. Ct. 603); *Scripps* v. *Wayne Probate Judge*, 131 Mich. 265 (90 N. W. 1061, 100 Am. St. Rep. 614). Power to admit wills to probate and to grant administration of estates is con-

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ferred upon probate courts, generally, by 1 Comp. Laws, § 650, which reads:

"The judge of probate for each county shall have power to take the probate of wills, and to grant administration of the estate of all persons deceased, who were at the time of their decease inhabitants of, or residents in, the same county, and of all who shall die without the State, leaving any estate within such county to be administered; and to appoint guardians to minors and others in the cases prescribed by law, and shall have and exercise all such other powers and jurisdiction as are or may be conferred by law."

It is further provided in 3 Comp. Laws, §§ 9282–9284, for admitting, in this State, wills of those who were domiciled abroad, and for the manner of disposing of estates of testators domiciled abroad whose wills are so admitted to probate here. These and other provisions of the statutes must be read together. It is plain that the legislature has recognized the right of the courts of the domicile of a testator to conclusively determine the validity of the will, and quite as plain that the courts of the domicile of this testator have made no such determination. It has been repeatedly held that the issue here upon the offering of a domestic will for probate is "will or no will." We have then these two methods provided by the legislature for admitting wills of deceased persons to probate: One, to try out every issue upon which validity of the instrument depends; the other, to accept the determination of all of these issues by the courts of the domicile of the testator. There is no method pointed out for admitting a will here as valid to the extent of appointment of an administrator of the estate, leaving the question of its validity to be determined at the domicile of the testator. It is not conceivable that the courts of this State will inquire about and finally decide that a certain instrument is, or is not, a valid will, subject to having the determination reversed by the courts of any other State. Assuming the right of each State to assert complete jurisdiction *in rem* over all property of decedents found within the State, including

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the right to determine, through its tribunals, the validity or nonvalidity of a foreign will, it is equally the right of each State, acting through its legislature, to accept as conclusive the judgment of the courts of the domicile of the testator as to the validity of his will and to permit his property, found in the State, to be disposed of according to the provisions of the will. I find in the statutes sufficient evidence of a State policy which denies to the probate court of Saginaw county the jurisdiction which it assumed when it admitted the particular will to probate. Holding these views, it is not important to refer to and review decisions of courts of other States in which a different view is expressed.

The judgment of the circuit court for the county of Saginaw is reversed, with costs to appellant, and the record is remanded, with directions to the probate court to refuse probate of the will.

MONTGOMERY, C. J., and HOOKER, MOORE, MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

MORRILL *v.* DETROIT & MACKINAC RAILWAY CO.

1. NEGLIGENCE — WARNING SIGNALS — INSTRUCTIONS TO JURY — RAILROADS.

   All question of the defendant's failure to warn the plaintiff, an employé of a distinct corporation, who was stationed on defendant's logging train unloading timber, was withdrawn from the jury by an instruction that no warning was necessary, because the plaintiff knew the train was about to start.

2. SAME—CUSTOM AND USAGE—OPERATION OF RAILROAD CARS.

   Testimony concerning the usual movement and jerking of the cars was competent to refute the defendant's theory and evidence that the usual and ordinary motion of the cars caused the injury.

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3. SAME—JERKING CARS IN STARTING.

It was sufficiently favorable to the defendant to charge the jury that, if the engineer started the train in the manner that an ordinarily prudent engineer would have done, there was no negligence.

Error to Alpena; Emerick, J. Submitted June 10, 1909. (Docket No. 48.) Reargued January 10, 1910. Decided February 3, 1910.

Case by Thomas Morrill against the Detroit & Mackinac Railway Company for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Charles R. Henry (*James McNamara*, of counsel), for appellant.

I. S. Canfield, for appellee.

OSTRANDER, J. Plaintiff was an employé of the Thunder Bay Boom Company, and defendant railway company was hauling logs from various lumbermen, which were unloaded from its cars by employés of the boom company. On September 16, 1907, when he had been employed for about six weeks, plaintiff was one of six men engaged in unloading logs from a train of 15 cars, 3 cars being unloaded at one time; one man being stationed at each end of each car. The method was to place the cars on the railroad bridge, and, as 3 were unloaded, to move the train so as to bring three other cars into position for unloading. Twelve cars had been unloaded, and the plaintiff had passed to the rear end of the rear car, and stood there awaiting the movement of the train. It is averred in the declaration that it was the duty of the defendant to so run, move,—

"Operate, and handle its said locomotives, log cars, and log trains that the said employés of said Thunder Bay Boom Company, while so unloading said log cars into said river, would have a reasonably safe place to work,

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and not start or stop such locomotives, log cars, or log trains so negligently, violently, or suddenly as to jerk said men in the said employ of said boom company, as aforesaid, from said log trains or log cars to said bridge or the ground, and to run, operate, and move said trains of log cars at the place aforesaid, while being so unloaded as aforesaid, without negligence, and with reasonable care, so that the men so employed as aforesaid would not be jerked or thrown about or from said cars and injured; that it was the duty of said defendant and its engineers, conductors, and employés of said defendant, when in charge of the running or moving of such log trains, at the place aforesaid, while such logs were being unloaded as aforesaid, when such trains were standing on such bridge for the purpose aforesaid, to warn said men so engaged, as aforesaid, before starting such trains, and after such warning to start and stop such trains with reasonable care, so as not to jerk or throw such men at work, as aforesaid, around or from said trains to said bridge or to the ground, and cause them to be injured."

The negligence of defendant averred is that, disregarding its duty,—

"And, without giving said plaintiff warning that it was about to move said train, started said train and cars up so quickly and violently and negligently that plaintiff, while using due care and diligence, and without any fault or negligence on his part, was jerked and thrown from one of said defendant's cars to the said bridge and ground."

Upon the subject of warning—giving notice that the train was to be moved—the court said to the jury:

"Now, gentlemen, that man was so thoroughly apprised of the fact that they were about to start that train that it would have been idle ceremony for any one to have said to him, 'We are about to start,' or ring a bell or blow a whistle. From some source, either what he saw, or for some reason, he had had his attention completely fixed upon the fact that that train was about to start, and therefore the question of whether he had any warning that the train was about to start or not is of no earthly importance in this case."

All question of a failure to give notice that the train

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was to be moved was thus eliminated favorably to defendant's contention. There remained the questions of defendant's negligence in moving the train, and of the plaintiff's negligence.

Plaintiff, upon his cross-examination, testified:

"I had hold for an ordinary start. There was nothing back of me to protect me from falling off. I don't remember whether I fell between the rails or on the outside of the rails. When I found that I was falling, I tried to jump; put my foot back to catch myself. I stepped back right off the end of the car trying to save myself."

When the plaintiff rested his case, counsel for the defendant moved for a directed verdict, in presenting which motion he said, among other things, that while there may have been, upon the occasion in question, a considerable jerk in starting the train, it could not be started without a jerk, that the trainmen were handling the train as they ordinarily handled it, and that no person in the position that the plaintiff occupied could avoid the danger of being knocked off by the sudden starting of the train. In overruling the motion the court said that undoubtedly the plaintiff had been employed for such a length of time that he assumed the ordinary risks—the risk of being thrown from the train by any ordinary jerk—but that there might be a degree of negligence on the part of defendant that would absolve plaintiff. If the train was started with an outrageous jerk, entirely outside of the ordinary movement, plaintiff would not be held to have assumed the risk.

It is upon the admission of testimony showing the manner in which the trains had theretofore been moved, and upon the charge of the court which is said to have permitted the jury to determine the fact of defendant's negligence, and the fact of plaintiff's contributory negligence, or want of negligence, by a comparison of the manner in which the train was moved upon the particular occasion and the manner in which the trains had theretofore been moved, that the assignments of error relied upon are based.

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Plaintiff was not an employé of the defendant. It was the theory of defendant that, whatever the movement of the log train upon the occasion in question, it was the usual movement, to which plaintiff had become accustomed, and with reference to which he ought to have acted. And while it was also claimed that the train was, upon the particular occasion, moved in a prudent manner, it was not error, in view of this theory, to admit testimony which tended to prove the manner in which the train had usually been moved.

The charge, considered as it must be in its entirety, is not open to the criticism which is made. It is favorable to defendant in presenting to the jury the duty of the plaintiff to conduct himself with regard for the movements of the train with which he had become acquainted. It was distinctly favorable to defendant in requiring the jury to find that the train was started with a much greater degree of force than had been usual. But the rule is stated, and is repeated, that if the engineer upon this occasion started the train in the manner that an ordinarily prudent engineer would have done, there was no negligence. If he did not, but "started it with a degree of force and speed, and a jerk, that an ordinarily prudent engineer would not have done under the circumstances, the defendant would be negligent."

No error appears, and the judgment is therefore affirmed.

MONTGOMERY, C. J., and HOOKER, MOORE, MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

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MITCHELL v. BILDERBACK.

1. FRAUDS, STATUTE OF—SALE OF LAND—COMPROMISE AND SETTLEMENT—PAROL AGREEMENT.
   An agreement not in writing between the owner of a farm to which he held title by foreclosure subject to redemption, and the person holding the equity of redemption, whereby the parties stipulated to sell the premises and divide the proceeds in proportion to their interests, is unenforceable as to a sale made seven years later, being void under the statute of frauds.

2. SAME—TRUSTS—PAROL AGREEMENT.
   Under the invalid agreement no trust could be created in proceeds which were not then in existence.

3. TRUSTS—EQUITY—PAROL DECLARATION—INTENTION.
   To create a trust by a parol declaration, where the donor retains the property, it must be executed by acts and words of a clear and unequivocal character, constituting something more than a mere declaration of intention.

Error to Cass; North, J., presiding. Submitted June 10, 1909. (Docket No. 29.) Reargued January 10, 1910. Decided February 3, 1910.

Hattie Mitchell presented a claim against the estate of Caiphas Dill, deceased, for an amount held in trust upon the foreclosure of certain mortgages. The claim was disallowed in the probate court, and claimant appealed to the circuit court. A judgment for claimant is reviewed by the administrator on writ of error. Reversed.

Clyde W. Ketcham, for appellant.

Coy W. Hendryx, for appellee.

HOOKER, J. The claimant filed a claim against the estate of Dill, which was disallowed by the probate judge. She appealed to the circuit court, where a jury rendered a

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verdict allowing the claim in full, $1,575. The administrator has appealed.

Outline of Facts. Dill held two mortgages on a farm aggregating $3,500. Mrs. Mitchell held a later mortgage on the same premises for $1,500. Subsequently Dill took another mortgage for $1,000 on the same land. The land was subsequently sold at execution sale, at the instance of a creditor of the mortgagor. The plaintiff purchased this title, and after the expiration of the period of redemption took possession. She also foreclosed her mortgage and bid in the premises; the deed becoming operative by the expiration of the period of redemption on March 19, 1898, subject to Dill's first two mortgages. Dill foreclosed these two mortgages, and bid in the land, and the foreclosure deeds issued thereon became operative on April 3, 1898. The claim of the plaintiff is based on an alleged oral agreement, made between Dill and herself a short time before the expiration of the period of redemption from his sale and purchase.

The evidence of this transaction consists of the oral testimony of plaintiff's brother-in-law, Mr. Caster, who testified that he was present and heard the conversation; that plaintiff's interest in the land would soon have been cut off by the foreclosure title of Dill; that plaintiff and he went to see Dill about it, and she said to him that of course she could redeem from his mortgages, but it was an obligation she did not like to assume, to stand on her rights to redeem, and he replied:

"'I don't really want the farm, for I am an old man, and we have a large farm now, to look after, and we really don't want it.' That was the argument of both of them, and they stood there for several visits we made, but finally we made a visit there when there was an agreement entered into that was proposed by old Mrs. Dill herself. * * *

"As I said, old Mrs. Dill spoke, after hearing the reasons why they didn't want to take the farm, she said, 'Why don't you sell the farm and divide the money, inasmuch as you don't either one of you want it?' She said

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she could see why Mrs. Middleton didn't want the farm, 'and I know Mr. Dill doesn't.' She says, 'Why not sell the farm and divide the money, if you don't either of you want to stand on your rights?' And that seemed to be a new proposition. They hadn't thought of it, and finally Mr. Dill says—he says, 'I don't know why that won't be a fair way to sell the farm.' He says, 'We know what we have each got in there.' He says, 'I have figured the interest on all the papers, all the interest,' and he says, 'It amounts to a one-quarter interest.' He says, 'You take the amount of money we have got in, and we will say nothing about figuring interest.' He says, 'You know what I paid Mr. Schimerhorn?' I says, 'I know what Mr. Schimerhorn said to me.' He says, 'That is what I gave, the face of the mortgages.'

"*Q.* How much?

"*A.* $3,500. He says, 'That is what I paid Mr. Schimerhorn.' He says: 'Of course on the mortgage I let him have $1,000; I had $4,500 in the farm, actual money that I have paid in the farm, $4,500,' and he says, 'You have fifteen hundred that you let him have on the third mortgage?' and he says, 'It is just three to one,' and she says, Mrs. Middleton, 'I have sixteen hundred in there.'

"*Q.* What was given to make up the sixteen hundred?

"*A.* Well, the execution; she says, 'I paid the execution to get possession of the farm.' He says, 'That is all right,' but he says, 'Did you figure this when you bought that that would give you possession of the farm, and you would get the execution money back?'

"*Q.* How much was the execution?

"*A.* $105, I think, if I remember right; $105, I think was the amount, but they figured it sixteen hundred. 'But,' he says, 'I figured we wouldn't count that; you will get that back just as you figured, and that leaves you fifteen hundred in and me forty-five, and you have got a year for this farm, and have it rented'—she had rented to one Mr. Anderson—and he says, 'During the year you have a right to sell it, and go on and sell.' He says, 'If you can sell the farm so that we will get our money'—they both said if they got their money out they would be satisfied. He says: 'During the year, if you can sell it so to get our money out of it, sell it. If you can get any money, we will divide in that ratio, if you get more than $6,000, but,' he says, 'if you don't sell, and

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I don't think you will sell it.' He says: 'The seasons have been bad, and the farm has been run, and it doesn't look good; I doubt whether you will sell it during the year, but if you get a chance, you sell it; we will both waive our rights, and next year,' he says, 'of course, I will go in possession of the farm. If you don't sell, I will sell it, but one thing I would like to provide about, the farm was run down, and I would like to see the farm fixed up,' and he says, 'We will if I do come in possession of the farm, and put the proceeds back on the farm until we fix it up a little and clean it up, and it is got a little better.' He says, 'This farm ought to bring a good price, $50 an acre.'

"*Q.* How many acres of it?

"*A.* 160 acres, and then he spoke, he says, 'It has been sold once I know of for $7,200, and,' he says, 'And no reason to me why, if this farm is fixed up it hadn't ought to bring $50 an acre, and if it does, it will let us both out,' and asked her what she thought of that, and she said to him, she hadn't thought of a proposition of that kind at all, and: 'I would like to think the matter over a little. I will let you know right away.' And this was in the middle of the week, and she said to him, she says: 'I will think the matter over, and we will drive over Sunday; I am anxious to get back my money, whether I stand on my rights, or whether I accept this proposition'—and he says, 'All right, take your time,' and then he spoke to me about it. He says, 'What do you think of that proposition, of that kind?' and I said, 'It seems to me that is fair enough if you want to dispose of the farm that way. That looks fair enough only,' I says, 'She has only—her time is limited to sell it in, a year, and your time seems to be unlimited. You say when you sell it you will divide?' And I said, 'Then it might be a fairly good proposition to you; you don't care to pay her anything until you do sell it,' and he says, 'That is a little one-sided,' and he says, 'Any time you feel I am not trying to sell it, you come over there and we will place it in some disinterested party's hands, and make the statement to him authorizing him to sell it,' and that seemed to be agreeable, and she says she would let him know Sunday, and he says: 'You needn't do that; it means a livery rig and take you out of the store.' And he says: 'I come to town every Saturday anyway, and I will call at your house, have to drive right by, and I will stop and get your decision Saturday

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afternoon, and make up your mind what you want to do about it.' When I went down at supper time that Saturday I remember his rig stood in front of the house, and when I got there, he came out of the house.

"*Q.* Did you have a talk with him there?

"*A.* Yes; he passed the time of day there, and said to me then, 'Well,' he says, 'I guess it is you and I for it; we settled that deal all right.' I says, 'I am glad of it.' I says, 'How have you settled it now?' He says: 'Just as I went over it; she is to sell it if she can, and if not, I am to sell it. I have got a farm of my own in Silver Creek, and decided to remain there permanently. That she was going back to Springport.' He said anything that came up, as a matter of opinion in reference to the farm, he could come and see me about it, and it would be the same as though she was there, and he says, 'We have decided just as we talked over there, that we are to sell the farm and divide the money.'

"*Q.* If you found a purchaser during the time she held the record title, she was to make transfer?

"*A.* Yes, sir.

"*Q.* And if after he acquired the record title, he was to sell and transfer and make the division?

"*A.* Yes, sir.

"*Q.* And the matter was determined in that way, at that time?

"*A.* Yes, sir.

"*Q.* Now, this $1,000 mortgage that he held — the $1,000 that he let Mr. Cullinane have on the fourth mortgage, was subsequent or after Mrs. Middleton's mortgage?

"*A.* Yes, sir.

"*Q.* And in this arrangement, do I understand that was to come in and share in the proceeds, too?

"*A.* Yes, he figured the amount he paid Cullinane on that mortgage.

"*Q.* Forty-five hundred?

"*A.* Yes, sir; that included the interest he had in the farm; figured in that way.

"*Q.* Now, during this talk there at the house, was there any talk about her having arranged for the money to redeem his mortgages?

"*Mr. Ketcham:* I object to that; immaterial and irrelevant whether she arranged for the money or not.

"*Q.* And did they have conversation in reference to it?

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"*Mr. Ketcham:* I object to that; irrelevant and immaterial whether she had talk with anybody about borrowing money.

"*The Court:* Well, if it is part of the same conversation, possibly it bears upon the proposition.

"*Mr. Hendryx:* It is part of the consideration, and she waives her right to redeem.

"*Mr. Ketcham:* Note an exception.

"*The Court:* You may take the answer. (Last question read.)

"*A.* She told Mr. Dill that she had arranged for money for him; that she could take up his mortgage at 6 per cent., and Mr. Dill says parties told her that they viewed the land, and if the security was good, she could have the money. He said to her, 'You needn't bother to go to any trouble to do that. If you conclude to stand on your rights, you can have the money; you can have it at 6 per cent. interest.'"

This talk appears to have been in the winter or spring of 1898. The same witness testified to a conversation with Dill in December, 1905, as follows, on the occasion of his calling to pay his taxes on other property:

"I called his attention to the 160 acres I assessed to him, the Cullinane farm, and he says: 'Yes, that is one thing I wanted to talk to you about, but,' he says, 'you are pretty busy.' He says, 'I suppose you know I have sold the Cullinane farm,' and I said, 'I didn't see any transfer of the place, but Mr. Swisher living near the place came to my house, saying that a lady in Chicago had written him to ascertain the amount, and that she would send a check, and I presumed from that you had sold it.' He says: 'Yes; I have sold that farm.' He says: 'That was the bargain; she was to pay the taxes.' and I says, 'I will give him the receipt after receiving the check.' He says: 'I am going back to Ohio.' I think he said he wanted to go for the holidays. Anyway, I concluded he was going back that day, and he says, 'I will return soon to Dowagiac, and I will be in here to settle with Mrs. Middleton,' and wanted me to have her here, and I said I would get her by telephone, and would let him go, and he says, 'All right,' and that was the last I saw of him.

"*Q.* Now, then, did he ask you anything—what did he say particularly about settling it?

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"*A.* He asked me if it was necessary for Mrs. Middleton to be here. I says: 'Yes; of course, I heard the bargain and understand the bargain.' And he says, 'All right,' he would let me know, and I could get her here, and 'I will settle with her just as we talked.'

"*Q.* According to the agreement?

"*A.* Yes, sir.

"*Q.* That would be one-fourth to Mrs. Middleton and three-fourths to Mr. Dill?

"*A.* Yes, sir."

A daughter of this witness testified that she was present at this last conversation.

"*Q.* Now, will you tell the jury, as near as you can, what the conversation was?

"*A.* Do you mean in reference to the Cullinane—

"*Q.* (Interrupting) Yes, in reference to your auntie's claim in the Cullinane property?

"*A.* He said that he had been down in Ohio, and had to go back again, and he said when he came back he wanted to settle up with Mrs. Middleton about the Cullinane farm. Is that correct?"

These witnesses were contradicted as to the last transaction by two or more men, who testified that they were present on that occasion. Caster was the only witness to the other conversation; both Dill and his wife being dead. Manifestly plaintiff could not testify by reason of the statute.

Dill went into possession on April 3, 1898, when his title matured. He afterwards sold the farm for $6,300, and deeded the premises on October 14, 1905. The claim filed was, "To proportionate mortgage share of sale of Dennis Cullinane farm in Silver Creek $2,500." The recovery was for $1,500 and a small amount of interest aggregating $1,575. The theory on which the plaintiff's counsel rest the right to a verdict is that the proceeds of the farm constituted a trust fund, in which the plaintiff had an interest. We have quoted the substance of the testimony relied on to establish a trust. The alleged agreement to sell this land and divide the proceeds was made in 1898, and was manifestly void under the statute

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of frauds. That was seven years or thereabouts before the sale of the land by Dill. Therefore there was not at that time a fund in existence in which a trust could be created by parol. In this respect the case is similar to *Rapley* v. *McKinney's Estate*, 143 Mich. 513 (107 N. W. 101), which followed *Collar* v. *Collar*, 86 Mich. 513 (49 N. W. 551, 13 L. R. A. 621).

The evidence is wanting as to a subsequent contract. The parties never met afterward, and the only semblance of a subsequent declaration of a trust was the alleged statement to Caster, made seven years later, that he "was going to Ohio, but would return soon to settle with Mrs. Middleton, * * * and would settle with her just as we talked." This was not said to the plaintiff, nor to an agent of hers. There is not the least evidence that Dill ever made a new contract or agreement or promise with or to plaintiff. On the contrary, the record conclusively shows that he did not. *Rapley* v. *McKinney's Estate, supra; O'Neil* v. *Greenwood*, 106 Mich. 572 (64 N. W. 511). We said in *Hamilton* v. *Hall's Estate*, 111 Mich. 291 (69 N. W. 484):

"But it is contended that in order to establish a parol trust the evidence must be very clear and satisfactory, and find some support in the surrounding circumstances and in the subsequent conduct of the parties. This rule is sustained in *Crissman* v. *Crissman, supra* [23 Mich. 216], as well as in *Allen* v. *Withrow*, 110 U. S. 119 (3 Sup. Ct. 517); *Bailey* v. *Irwin*, 72 Ala. 505; 1 Perry on Trusts, §§ 77, 86. To create a trust where the donor retains the property, the acts or words relied upon must be unequivocal. *Young* v. *Young*, 80 N. Y. 422 (36 Am. Rep. 634); 27 Am. & Eng. Enc. Law (1st Ed.), p. 56, and cases there cited. And this rule applies with peculiar force where it is claimed that the donor constituted himself trustee. *Williamson* v. *Yager*, 91 Ky. 282 (15 S. W. 660, 34 Am. St. Rep. 184). In *Beaver* v. *Beaver*, 117 N. Y. 421, 428 (22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531), which was cited with approval by this court in *O'Neil* v. *Greenwood*, 106 Mich. 572 (64 N. W. 511), it was held that, 'to constitute a trust, there must be either an explicit declaration of trust, or circumstances

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which show beyond reasonable doubt that a trust was intended to be created.' The mere declaration of an intention or purpose to create a trust, which is not carried out, is of no value, and a mere agreement or statement of an intent to make a gift in the future is not sufficient. It must be such that from the time it is made the beneficiary has an enforceable equitable interest in the property, contingent upon nothing except the terms imposed by the declaration of the trust itself."

The judgment is reversed, and a new trial ordered.

MONTGOMERY, C. J., and OSTRANDER, MOORE, MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

CASE v. CASE.

1. DIVORCE—EXTREME CRUELTY—REFUSAL TO COHABIT.
   A complete refusal of a defendant to cohabit with her husband during a period of nearly three years constitutes extreme cruelty.

2. SAME—COLLUSION.
   No evidence of collusion warranting the court in denying a decree for divorce is presented by a showing that the husband consulted a lawyer concerning his right to a divorce and his wife thereafter refused for about three years to perform her marital duties, or by the fact that the parties adjusted their property matters by an agreement of the husband to pay her alimony in a lump sum. HOOKER, J., dissenting.

Appeal from Oakland; Smith, J. Submitted June 11, 1909. (Docket No. 55.) Decided September 21, 1909. Motion for rehearing submitted October 8, 1909. Granted November 5, 1909. Reargued January 4, 1910.

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(Docket No. 1.) Opinion vacating the former opinion filed February 3, 1910.

Bill by Jesse C. Case against Clara E. Case for a divorce. From a decree dismissing the bill, complainant appeals. Reversed, and decree entered for complainant.

Andrew L. Moore, for complainant.

Perry & Lynch, for defendant.

HOOKER, J. This bill was filed by the husband against the wife for divorce, and was taken as confessed, and heard under a stipulation; an agreement being also made providing for the payment to her of $2,150 alimony contingent on complainant's obtaining a decree of divorce. The records and files of the court showed that he had been previously divorced at the suit of a former wife. The circuit judge caused the defendant to be subpœnaed, and her testimony was taken. He concluded that some of the charges in the bill were false, and intimates that her refusal to cohabit with him was due to his expressed desire for a divorce. We may add to that the fact that she does not oppose the divorce, and apparently made her testimony as nearly harmless to him as she could. We are far from certain that a money consideration was not the cause of this, and that in this sense at least the proceeding was not collusive.

The learned circuit judge who saw and heard the witnesses was in a better situation to judge of the case than we, and while, if believed, the complainant's testimony might have justified a decree in his favor, we are not so sure that he is so deserving as to make it incumbent upon us to reverse his decree. The law makes divorce dependent upon connubial wrong, not mere incompatibility, and courts can only follow and enforce the law. Owing to the fact that in most divorce cases the relations of the parties have become so strained that there is a mutual interest if not a mutual desire that a divorce be decreed,

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there is frequently much difficulty in ascertaining the truth, and, so long as the present rules of law continue, it is in keeping with their spirit to require clear proof of misconduct, and absence of collusion before granting divorces upon the testimony of the complainant on bills taken as confessed.

The decree is affirmed.

GRANT, MONTGOMERY, OSTRANDER, and MOORE, JJ., concurred.

ON REHEARING.

HOOKER, J. This cause has been argued before the full bench, upon a rehearing granted on motion of the complainant. The bill filed in the cause contains allegations which, if proved, might justify a decree if the acts were without cause. The circuit judge saw the parties and heard their testimony, and he states unqualifiedly that the defendant is a refined and educated woman, that the complainant's testimony was false in more than one particular, and that the only ground upon which a divorce could be granted was her refusal to cohabit with him, which she admits for two years or more. The testimony fully warrants the judge in believing that both parties desired him to grant this divorce. It is plainly perceptible from the atmosphere of the case, and the apparent disinclination of the defendant to place any impediment in the way. But the decree was not based on collusion in either court. The defendant's testimony, however, warrants the inference that she took interest in his affairs and cohabited with him until about two years ago:

"*The Court:* And he further says that from appearances you took no interest in his business affairs. Is that true?

"*A.* Well, since when? I have not taken much interest in it for two years. Since I commenced to know that we could not live together I have not taken so very much interest in affairs.

"*Q.* How long has it been since you did not take any interest in his affairs?

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"*A.* Since he came up to see Mr. Moore about getting a divorce. About two years ago, pretty nearly.

"*Q.* Now, he states that you did not treat the hired help properly, and that you did not cook for them and treat them properly. Was that true, the latter part of your married life?

"*A.* Yes, sir, for the last two years. Before that I treated them properly, but since the last two years I don't claim to have.

"*Q.* Now, he speaks of his brother coming there, and you treated him in such a manner that he had to go away?

"*A.* Yes, that is true.

"*The Court:* What was the trouble with his brother and his people?

"*A.* No particular trouble except that I did not like him, and I knew he was not there for any good. I thought he came there for a visit, and I did not care particularly about waiting upon him, and thought he had as much time to make his bed as I did.

"*Q.* Did you tell Mr. Case that you did not want him there?

"*A.* No, I did not say much of anything to him. I told my husband before that I did not care to entertain his brother any more. I did not make his bed. * * * I suppose there is some truth in it probably. I don't know exactly what he means by decent. I tried to be decent to him. I don't quite understand his meaning. He knew the time the meals were always ready. I rung the bell, and if he heard it he would come. I ate my meals alone quite frequently. I do not like to quarrel at the table, and so I ate alone. I know that it takes two to quarrel. * * *

"*Q.* One principal charge was that you refused to room with him. What was there about that, and since what year?

"*A.* I don't know as there was any particular cause for it. I don't know. I commenced to so thoroughly dislike the man I could not occupy the same room with him.

"*The Court:* And you refused because of this personal dislike to cohabit with him and to occupy the same room with him for how long, two years?

"*A.* Yes, sir.

"*Q.* And that has been continuously?

"*A.* Continuously, yes.

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"*Q.* How long ago was it that a divorce was talked by you parties?

"*A.* Why, two years, is it not? He suggested getting a divorce. We have agreed on a settlement of our property matters. I do not see any other course to take. I knew he was coming to see his attorney and talking with him about a divorce.

"*Q.* It is because of that talk, is it not, that you filed no answer or appeared in this case?

"*A.* Well, I don't think I have any grounds. I did not care to make any defense to it."

It is unnatural for such a state of affairs as complainant claims to have existed without any cause. Yet he professes entire ignorance of any reason for her conduct. It requires some credulity to believe this. Moreover, when we examine the testimony quoted, we find that there was a reason for her dislike and refusal to cohabit. A refusal to cohabit may be ground for divorce on the ground of cruelty, but not when the refusal is based on the expressed desire of a spouse for a divorce, accompanied by visits to a lawyer with that object in view. While the writer of this opinion is profoundly impressed that it would be for the benefit of both parties and the public that incompatibility such as is here shown should itself be a ground for divorce, it is doubtful if the consensus of public opinion would approve. Certainly legislation has not advanced so far, as was said in the original opinion. And courts are expected to enforce the law, not make it. We know that there is great laxity in divorce litigation. It is a matter of current comment by the public and the press. Yet the law only authorizes it on proof of certain connubial wrongs. Evidently the circuit judge was convinced that the greatest wrongdoer was the husband, and I am not convinced that he was not. Under these circumstances, I cannot consistently assent to a reversal of this case. The decree should be affirmed.

STONE, J. I am unable to concur with Justice HOOKER in this case. In my opinion the complainant has, by his

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bill and evidence, made a showing that entitles him to a decree of divorce. The parties were married on May 12, 1903. The complainant had been before twice married. His first wife died upwards of 21 years ago. He was married to his second wife in 1888. In 1899 she obtained a divorce from him on the grounds of extreme cruelty and habitual drunkenness. In his bill of complaint in this case, the complainant states his grounds of divorce to be that the defendant, shortly after she came to his home, manifested a surly, sullen, and ugly disposition; that the second week she was there she came to the table five days in succession and did not speak to the complainant or any one else, and that she would often have spells when she would not speak to any one; that she was not satisfied with the conditions of the home, but continually found fault with the complainant, with the home, and with the surroundings; that in the winter of 1903–4 she threatened to go away and leave the place, and that she often repeated this threat. And again, in the fall of 1904, she threatened to leave and vacate, stating that she had a son and she could go and live with him. And during the years of 1903 and 1904 there were many occasions when she would not speak to the complainant for days, and there were often many occasions when she would not get his meals, nor meals for the men employed about the farm; that about the 1st of August, 1904, defendant left the home of complainant for about four weeks; that in the fall of 1904 complainant went to one of the neighbor's homes on an errand, and when he came back to his home defendant was angry and in a state of excitement, and that she there accused complainant of running after bad women, and said that he was chasing around after that class of people in the neighborhood. Complainant alleges that this accusation was wholly false and unwarranted; and yet, in spite of that fact, it was repeated subsequently by defendant on several occasions; and defendant accused complainant of visiting houses of ill fame in the city and resorting with that class of people. All of which complain-

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ant states was wholly false and entirely uncalled for; that in the winter of 1905 defendant often said to complainant that she did not care anything for him, or for any of his people. She had stated repeatedly that she would rather live alone, and stay alone. And when asked why she remained at complainant's house, she stated she would stay simply to annoy him and make him trouble.

The bill further charges that about the month of March, 1906, defendant fitted up in the home of complainant a room, and that from that time on she refused to cohabit with complainant, to sleep with him, or to occupy the same room with him; and that she has continued to so refuse from that time until the time of filing of the bill, and that she repeatedly stated that she would not cohabit with complainant in the future, and that she would not occupy the same room with him, and insisted that she would have nothing to do with him whatever; that on some occasions the defendant refused to get meals for complainant, or for the hired help; that she would leave the home without notifying complainant and not return at meal time; that on some occasions she would sit at the table for a part of the meal time, and on others would refuse to sit at the table at all; that as soon as her meals were over she would go to her room and remain there; that she would refuse to sit with complainant and companion with him, or in any way act toward complainant as a wife should towards her husband; that on several occasions complainant would have to go to neighbors for his meals, and that he has been obliged to get meals at his neighbors for the hired help; that on one occasion she refused to cook for the threshers, when they had threshers at the farm. Complainant was obliged to get the threshers' meals at his neighbor's and pay for them. On many occasions she left the home without leaving any provisions prepared, and would go away for days without giving any warning to complainant that she was going away, and without leav-

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ing anything for complainant or hired help to eat while she was gone. The bill of complaint was taken as confessed after personal service of a subpœna and appearance by her solicitor. The testimony of the complainant fully sustains the allegations of the bill, and is corroborated in many instances by several witnesses. It is only fair to say, however, that he is not corroborated as to his claim that the defendant accused him of consorting with lewd women.

By order of the court the defendant was examined as a witness in the case. Her testimony fully sustains the charge of complainant that she had refused to cohabit with him for upwards of two years. Justice HOOKER has quoted some of her testimony. She further testified as follows:

"*Q.* Do you know of your husband going over to the neighbors and getting meals on various occasions?

"*A.* I can't tell you. I was not there. I don't know whether he did or not.

"*Q.* He said the reason he went was because you did not get his meals at home. Is that true?

"*A.* I presume it is, very likely, if he did not eat at home he would go away.

"*The Court:* The principal charge was this: Excuse me, I am able to state it without reading the testimony. One principal charge was that you refused to room with him. What was there about that, and since what year?

"*A.* I don't know as there was any particular cause for it. I don't know. I commenced to so thoroughly dislike the man I could not occupy the same room with him.

"*The Court:* Was it because of any physical condition on his part?

"*A.* Oh, no.

"*The Court:* The lack of cleanliness?

"*A.* He was not particularly clean by any means.

"*Q.* What was the real reason? The principal reason?

"*A.* Well, I don't know. There were so many little reasons. I suppose I could have endured him if I had liked him at all.

"*Q.* It was largely because of your personal dislike? You did not like the man?

"*A.* I don't know.

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"*Q.* Was it because of anything he had done himself personally, associating with other people? Anything of that sort?

"*A.* Oh, no.

"*Q.* With other women, for instance?

"*A.* Oh, no. We never had any trouble about that matter.

"*Q.* Was there any trouble between you and him because of the use of intoxicating liquor?

"*A.* No, he did not use intoxicating liquor.

"*The Court:* Did he when you married him?

"*A.* No.

"*The Court:* He quit before that?

"*A.* Yes.

"*The Court:* And you refused because of this personal dislike to cohabit with him and to occupy the same room with him for how long, two years?

"*A.* Yes, sir.

"*Q.* And that has been continuously?

"*A.* Continuously, yes.

"*Q.* I would like to ask you this question as to whether or not you think it is possible for you and Mr. Case to live together as husband and wife now or in the future?

"*A.* I do not.

"*Q.* Would you live with him?

"*A.* No, I don't think I would. I could not the way I feel now about it.

"*Q.* You have got very decided views on that subject, I take it?

"*A.* Yes, sir.

"*Mr. Lynch:* You never made a charge, as I understand it, about your husband being intimate with other women around there?

"*A.* No, I never entertained any suspicion of anything of that kind.

"*Mr. Moore:* During the time you have ceased to cohabit with Mr. Case has there been any period when you did occupy the same room with him?

"*A.* No, there was not.

"*Q.* After the room which you spoke of—your room—was fitted up by yourself, that was occupied to the exclusion of Mr. Case?

"*A.* Yes, sir.

"*Q.* During that period covering something like two years do you know of any time when he was ever in your room, either day or night?

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"*A.* No, sir. I recall the occasion when the threshers were there. They were fed at the neighbors.

"*The Court:* How long ago was it that a divorce was talked by you parties?

"*A.* Why two years, is it not? He suggested getting a divorce. We have agreed on a settlement of our property matters. I do not see any other course to take. I knew he was coming to see his attorney and talking with him about a divorce.

"*Q.* It is because of that talk, is it not, that you filed no answer or appeared in this case?

"*A.* Well, I don't think I have any grounds. I did not care to make any defense to it.

"*Mr. Lynch:* And did I not state to you at the time you employed me that you had no grounds for divorce against Mr. Case, when we talked over the case.

"*A.* Yes, sir. And then we talked over an adjustment of the alimony matter."

There can be no doubt that the evidence in this case fully sustains the charge that the defendant has utterly refused to cohabit with the complainant for upwards of two years, that she has so refused persistently and continually. She gives no reason for this except that she came to utterly dislike the man, and that she could not endure him. It is true she states that some two or three years ago the complainant consulted a lawyer with reference to a divorce. This seems to have come to her knowledge, and she made it the occasion for refusing to cohabit with him. I do not think that it can be said that he had not the right to consult with a lawyer, if he claimed his wife was not performing her marital duty. Nor do I believe that that can be urged as a ground of justification for her subsequent conduct. It is true this man's second wife had obtained a divorce from him. This the defendant does not complain of. She does not claim that she was deceived in the matter in any way, but states frankly that while the complainant had not told her of this divorce, yet he supposed his sister had told her, and she made no complaint of it. There was no claim of collusion in the court below, nor is there any in this court. Neither

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is there any evidence to warrant such a claim. The fact that the wife gives a cause for divorce by refusing to cohabit with her husband is no evidence of collusion. The question of the refusal to cohabit as a ground for divorce is not a new proposition in this State. This court has, in numerous cases, sustained the doctrine upon the ground of extreme cruelty. *Menzer* v. *Menzer*, 83 Mich. 319 (47 N. W. 219, 21 Am. St. Rep. 605); *Whitaker* v. *Whitaker*, 111 Mich. 202 (69 N. W. 1151); *Campbell* v. *Campbell*, 149 Mich. 147 (112 N. W. 481, 119 Am. St. Rep. 660); *Donaldson* v. *Donaldson*, 134 Mich. 291 (96 N. W. 448).

It is not necessary to discuss the question as to whether such conduct would amount to wilful desertion. It seems to me that where there has been a complete refusal on the part of the defendant to cohabit with the complainant for a period of nearly three years—a continuous and positive refusal—the only basis of the refusal being that she did not like the complainant, this conduct constitutes extreme cruelty within the meaning of our statute, and warrants a divorce from the defendant in such a case.

It will be observed from her testimony that the wife makes no charge of drunkenness or consorting with lewd women on the part of the complainant. She distinctly testifies that during her married life he had not drank at all. So far as this record shows, the complainant had fully reformed from the drink habit.

It is true that the circuit judge saw and heard the witnesses and the parties, but it seems to me that he is not warranted in some of the conclusions which he drew in the case, and that these conclusions are not supported by the testimony. The mere fact that this man's second wife had obtained a divorce from him should not be any reason why he might not have a standing in a court of equity in such a case as this, especially where there is no claim that he has been guilty of the same offense towards the present spouse.

In view of the opinion of Justice HOOKER, it has

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seemed to me necessary to set forth somewhat fully the claim of the complainant in his bill of complaint, and the somewhat extended testimony of the defendant. In my judgment the decree below should be reversed, and one entered in this court granting a divorce to the complainant.

MONTGOMERY, C. J., and OSTRANDER, MOORE, MCALVAY, BROOKE, and BLAIR, JJ., concurred with STONE, J.

BLISS *v.* TYLER.

1. CREDITOR'S SUIT—BILL IN AID OF EXECUTION—ATTACHMENT—JUDGMENTS.

   Neither a creditor's bill nor a bill in aid of execution is sustainable upon a judgment in attachment against a nonresident, wherein the jurisdiction of the court depended on the debtor's ownership of the land attached and where the bill of complaint avers that legal title thereto was taken in the name of a third person, for the convenience of the debtor.

2. SAME—GENERAL RELIEF.

   A bill of complaint in which it is claimed that certain property of a nonresident debtor has been impounded by the creditor in attachment proceedings, cannot be sustained as a bill for impounding equitable assets based on the ground of continued absence from the State.

Appeal from Saginaw; Kendrick, J. Submitted October 21, 1909. (Docket No. 133.) Reargued January 5, 1910. Decided February 3, 1910.

Bill by Allaseba M. Bliss and Lorenzo T. Durand, executors of the last will and testament of Aaron T. Bliss,

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deceased, against Carrie B. Tyler and Fred B. Tyler to set aside a deed, and for authority to sell said property under a *fieri facias*. From a decree overruling a demurrer to the bill, defendant Carrie B. Tyler appeals. Reversed, and remanded.

John A. McKay (*William J. Gray* and *Lorenzo T. Durand*, of counsel), for complainants.

Jonathan Palmer, Jr. (*Elbridge F. Bacon* and *George W. Weadock*, of counsel), for appellant.

OSTRANDER, J. The bill in this case was filed by Aaron T. Bliss in his lifetime, and the suit was continued in the names of his executors. The bill alleges that complainant obtained, July 3, 1906, a judgment in an attachment suit against the defendant Fred B. Tyler, in the circuit court for the county of Saginaw, for $16,685.91; that said Fred B. Tyler, formerly a resident of Saginaw, has resided continuously for 10 years in the city of Paris, France, and has not meantime returned to the State of Michigan; that previous to the rendition of said judgment, Fred B. Tyler was the owner in fee simple of the real estate described in the bill; that title to said real estate was, for convenience, taken in the name of Silas W. Tyler, and that said Fred B. Tyler was the equitable, legal, and beneficial owner of said real estate; that said judgment remains in full force and effect; that complainant caused a writ of *fieri facias* to be issued and delivered to the sheriff, with instruction to levy upon the real estate and personal property attached in said judgment proceeding; that on July 3, 1906, the sheriff levied upon said real estate; that on February 4, 1904, the defendant Fred B. Tyler caused his agent and trustee, Silas W. Tyler, to make a conveyance in fee of said real estate to his wife, the defendant Carrie B. Tyler, also of France, for a pretended consideration of $1 and other valuable considerations; that said conveyance was a mere sham, made with intent to defraud complainant and other creditors of Fred B. Tyler; that Fred B. Tyler paid

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the consideration for the deed to Silas, and that neither Silas nor Carrie B. Tyler paid anything for said conveyance; that said Carrie B. Tyler holds the land in trust for said Fred B. Tyler for his use and benefit, and for the purpose of preventing a levy and sale of the same under and by virtue of said execution; that said Fred B. Tyler has no personal or real estate in said State of Michigan, except the land and personal property described in said writ of attachment, upon which the sheriff could make a levy. Complainant prays for an answer under oath by the defendants, and that they answer several interrogatories specified therein; that the complainant be authorized to proceed on the said writ of *fieri facias*, and that the sheriff be directed to advertise and sell the said premises for payment and satisfaction of said judgment, and that said deed to said defendant Carrie B. Tyler be declared null and void. The defendant Fred B. Tyler did not appear, and an order *pro confesso* has been entered as to him. Defendant Carrie appeared and demurred to the bill, and the demurrer was overruled September 21, 1908. Her default for not answering was regularly entered November 11, 1908. Subsequently she attempted to appeal from the decree on demurrer to this court, and her appeal was dismissed because not taken in time (156 Mich. 640 [121 N. W. 292]). She then applied to the circuit court to extend the time for taking an appeal. An order was granted to that effect, and the case is now before us on her appeal.

She alleges eight grounds of demurrer, which may be considered under three heads:

(1) That the court had no jurisdiction to render the judgment at law.

(2) That the bill cannot be maintained as a creditor's bill because no execution was returned unsatisfied in whole or in part.

(3) That the bill cannot be maintained as one in aid of execution because the title of Fred B. Tyler to the land was equitable and not legal.

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It appears that the judgment of complainants in the attachment proceedings is based, not upon any personal service of process, but upon the levy of the writ upon real estate. The judgment is not conclusive against the defendant Fred B. Tyler, and the execution issued to collect the same can be levied only upon the property attached. 3 Comp. Laws, § 10577. This was the practice pursued. Complainants do not occupy the position of judgment creditors who can find no property of the judgment debtor to satisfy their demand, and they have therefore no right, as judgment creditors, to a general discovery of concealed assets and equitable interests in property belonging to the debtor. The bill cannot be sustained as a judgment creditor's bill.

Nor can it be sustained as a bill in aid of execution. The execution does not run against the property of the debtor generally. The record title to the land levied upon was never in the debtor. The interrogatories, already referred to, require defendants to state whether Fred B. Tyler did furnish the money to Silas W. Tyler to purchase the premises; whether he instructed Silas W. Tyler to convey to defendant Carrie B. Tyler; whether Carrie paid anything for said conveyance. Complainants put in issue the essential fact upon which the judgment rests, namely, the ownership by defendant Fred B. Tyler of the premises attached. In other words, a judgment which can affect nothing but the land which has been attached, which is obtained by asserting that a particular person owns the land, is made the basis of a proceeding in equity to determine whether that person did own the land. It is a proceeding to determine whether the title to land rested where it had to rest in order to entitle complainants to the judgment. I do not understand how complainants can stand upon the judgment, and yet tender an issue upon the very fact upon which the judgment rests; nor how they are aided by the fact that the facts which are well pleaded are admitted by the demurrer.

As the case is presented upon general demurrer to the

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bill, and the demurrer was overruled at the circuit, we have examined the allegations of the bill for the purpose of determining whether a case for equitable interference is made out. We have concluded that in its present form, although the appointment of a receiver is asked for, it cannot be sustained as a bill for the impounding of equitable assets of a debtor against whom, because of his continued absence from the State and residence abroad, no legal proceedings can be instituted. See *Earle* v. *Kent Circuit Judge*, 92 Mich. 285 (52 N. W. 615). A sufficient reason for this conclusion is that complainants allege that they have impounded the particular property, the title to which is in dispute, in legal proceedings, which have resulted in a judgment binding the property. The sixth ground of demurrer is good, and the demurrer should have been sustained.

The decree below is reversed, and a decree will be entered in this court sustaining the demurrer, remanding the record, and giving complainants 40 days in which to amend, if they desire to do so. Appellant, Carrie B. Tyler, will recover costs of both courts.

MONTGOMERY, C. J., and HOOKER, MOORE, MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

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BLISS v. SAGINAW CIRCUIT JUDGE.

APPEAL AND ERROR — EXTENSION OF TIME FOR APPEAL — CHANCERY PRACTICE — EFFECT OF DISMISSAL FROM SUPREME COURT ON A SUBSEQUENT EXTENSION—MANDAMUS.

After the dismissal of an appeal to the Supreme Court, because the claim of appeal was not filed in time, it is discretionary with the circuit court to extend the time for filing the claim of appeal on terms, and mandamus will not issue to vacate such an extension for cause shown.[1]

Mandamus by Allaseba M. Bliss and Lorenzo T. Durand, executors of the last will and testament of Aaron T. Bliss, deceased, to compel William R. Kendrick, circuit judge of Saginaw county, to vacate an order extending the time for taking an appeal. Submitted October 5, 1909. (Calendar No. 23,528.) Writ denied February 3, 1910.

John A. McKay (*William J. Gray* and *Lorenzo T. Durand*, of counsel), for relators.

Jonathan Palmer, Jr.) *George W. Weadock* and *Elbridge F. Bacon*, of counsel), for respondent.

BLAIR, J. This court having dismissed an appeal from an order overruling a demurrer (*Bliss* v. *Tyler*, 156 Mich. 640 [121 N. W. 292]), on the ground that the appeal was not timely, respondent entered an order extending the time for taking an appeal, which has been taken, and is now pending in this court and on the docket for hearing at the present term. The relators applied to this court for a peremptory writ of mandamus requiring respondent to vacate his order extending the time for appeal. An order to show cause issued, to which respondent has filed his

[1] Act No. 340, Pub. Acts 1907.

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return. At the time of making the order, the court gave the following opinion:

"*The Court:* This is a matter that appeals to me as one wherein a misunderstanding of the law upon instructions from his client has honestly miscarried. Mr. Palmer, as the agent and attorney in one sense of Carrie B. Tyler, was instructed to do all things that would protect her rights and interests in this matter, as an attorney, and use his ability as an attorney, but he fell short of the mark, and he did not in my judgment do those things, and what has been demonstrated by the court, he failed to perform his duty as a lawyer and file his notice of appeal in proper form. It is certainly the policy of all courts of justice, and especially of courts of chancery, to permit a hearing in a case if it can be reasonably done, to the end that they may have the matter considered upon the merits. I confess it is in many ways a close case. It appeals to me as along the line of a very close condition of facts, as presented. But I believe it is my duty at this time to grant the motion of extending the time, on condition—and I think they should answer for their failure to understand the law better, and act promptly, but as it appeals to me, there should be an extension of time for 30 days, and that the proponent of the motion should pay a solicitor's fee of $15. Upon the payment of that, that they be permitted to make an appeal."

The showing in support of the motion for leave to appeal fully supports the decision of the circuit judge. *Merriman* v. *Jackson Circuit Judge*, 96 Mich. 603 (55 N. W. 1021); *Witham* v. *Clinton Circuit Judge*, 150 Mich. 568 (114 N. W. 337); *De Lisle* v. *Wayne Circuit Judge*, 158 Mich. 16 (122 N. W. 362).

The writ is denied, with costs.

MONTGOMERY, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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SISSON v. LAMPERT.

1. CONSTITUTIONAL LAW—CIVIL-DAMAGE ACT—STATUTES — TITLE.
   The act for the regulation of the manufacture and sale of intoxicating liquors is not in violation of the Constitution of 1850, art. 4, § 20, providing that no law shall embrace more than one object which shall be expressed in its title, in that it provides a civil remedy for the violation of the statute. 2 Comp. Laws, §§ 5379–5446.

2. INTOXICATING LIQUORS—CIVIL-DAMAGE ACTION—EVIDENCE.
   Testimony concerning the intoxicated condition of the deceased on the day he was killed is admissible in an action against a saloonkeeper for damages sustained by his wife on account of his death.

3. SAME — EVIDENCE — HYPOTHETICAL QUESTIONS — SAVING QUESTIONS FOR REVIEW.
   An objection that a hypothetical question is too long does not make the point that it contains facts which are not supported by the evidence.

4. SAME—HABITS OF DECEASED—SURETIES' LIABILITY.
   Testimony concerning the habits of the deceased in the use of intoxicating liquors during the period prior to the execution of the defendant's bond, is admissible for the purpose of showing the illegal nature of the sales and the right to exemplary damages.

5. SAME—EVIDENCE—CROSS-EXAMINATION.
   The exclusion of testimony, on cross-examination of the plaintiff, offered to show a conspiracy by proving an agreement to divide the proceeds with one witness, is not prejudicial error where the question had been previously asked and answered and the purpose was not indicated to the trial court.

Error to Kent; Perkins, J. Submitted November 8, 1909. (Docket No. 177.) Decided February 3, 1910.

Case by Adella M. Sisson against Theodore Lampert, principal, and Andrew Hill and Richard Havinga, sureties, and Robert W. Swayze, principal, and Vard S.

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Raymond and Henry W. Booth, sureties, under the civil-damage act. A judgment for plaintiff is reviewed by defendants on writ of error. Affirmed.

E. J. Doyle (*Francis A. Stace*, of counsel), for appellants.

John J. McKenna, for appellee.

MONTGOMERY, C. J. This action was brought against two saloon keepers, one maintaining a place of business at Ada, Kent county, and the other at Lowell, in the same county. The bondsmen of each are joined in the action. The action is to recover damages caused by the death of the plaintiff's husband while intoxicated; intoxication having been induced by liquors sold by the two different dealers, as found by the jury. The plaintiff recovered a verdict of $3,000, and the defendants bring error.

The first contention made is that the stutute (Act No. 313, Public Acts 1887, being chapter 138, §§ 5379–5446, 2 Comp. Laws) is unconstitutional, and particularly that section 20 of the act, providing a civil remedy, is unconstitutional as not within the title. The title of the act is:

"An act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving or delivering spirituous and intoxicating liquors, and malt, brewed, or fermented liquors, and vinous liquors in this State," etc.

It is claimed that this violates article 4, § 20, of the Constitution of 1850, which provides that no law shall embrace more than one object, which shall be expressed in its title. There are many cases in which this court has declared that the effect of this constitutional provision is to restrict legislation to one general object expressed in the title, and that it is no infringement of this section to embody any provision germane to and reasonably collateral to the general object expressed. Under a title of an act to regulate the sale of intoxicating liquors any provision

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which relates to the regulation of such sale, and provides either a civil or criminal remedy, is clearly within the constitutional provision thus interpreted.

A case very much in point is that of *Fortin* v. *Electric Co.*, 154 Mich. 316 (117 N. W. 741). The title to the act there under consideration was: "An act to regulate the operation of electric cars within the county of Bay." The act contained a provision for a civil remedy and also a penal provision. It was said:

"The title to the act is sufficiently broad to cover the subject. It is obvious that an act to regulate the operation of electric cars would have, under that statement, for its purpose the protection of those who are called upon to make use of such cars, as well as others with whom such cars might come in collision."

The case is rested in part upon the analogy of the statute here under consideration and the one there considered. It was said:

"In the case of *Robison* v. *Miner*, 68 Mich. 549 (37 N. W. 21), it was held that there was but one general purpose indicated by this title."

It is claimed that error was committed in permitting various witnesses to testify as to the intoxicated condition of the deceased on the day when it is alleged that his death resulted from his condition. This testimony was entirely competent under the authorities. *Cook* v. *Insurance Co.*, 84 Mich. 12 (47 N. W. 568); *State* v. *Cather*, 121 Iowa, 108 (96 N. W. 722); *People* v. *Eastwood*, 14 N. Y. 566; *Edwards* v. *City of Worcester*, 172 Mass. 105 (51 N. E. 447); and *Dimick* v. *Downs*, 82 Ill. 572.

It is next claimed that the court erred in submitting hypothetical questions to Dr. McCormick, for the reason that it is now urged that the question embodied facts of which no testimony had been offered. We find, however, upon examination of the record, that this distinct point was not made. It was objected that the question was too lengthy, but the facts embodied in the question, of which it is now claimed no testimony was offered, were not

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pointed out so that the trial court would have the opportunity of examining the stenographer's minutes and correcting it. We think the objection was not well taken.

Objection was also made to the testimony showing the habits of deceased as to the use of intoxicating liquors prior to the year when these defendants became bondsmen for the two dealers, and prior to the date in question. We think this testimony was competent as tending to show that Sisson was a man in the habit of getting intoxicated, and thus showing that the sales made to him on the day in question were illegal. The court expressly limited the testimony to this purpose, and for the purpose of bearing upon the question of exemplary damages. No error was committed in this ruling.

On cross-examination of the plaintiff the defendant asked as to whether a contract had not been made between her and one Wood with reference to the conduct of this suit. This testimony was offered for the purpose of showing barratry. The witness, however, had already testified that she had made her contract with her attorney, McKenna, and had distinctly answered the question as to whether Mr. Wood was to receive any percentage by saying: "I don't know. I don't think he is." The question was then repeated:

"Well, you have stated the terms of the contract. I will ask you if Wood is not to get a percentage of the winnings."

This was objected to. It is now argued in this court that one purpose of this testimony was to show a conspiracy; the defendant citing and relying upon *Mawich* v. *Elsey*, 47 Mich. 10 (8 N. W. 587, 10 N. W. 57), and *Cole* v. *Railway Co.*, 81 Mich. 156 (45 N. W. 983). It is manifest that no such purpose was indicated to the trial court. We think no error was committed to the prejudice of the defendant in the rulings of the trial court upon this subject.

The questions relating to the charge of the court are, we

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think, sufficiently answered by the very recent case of *Merrinane* v. *Miller*, 157 Mich. 279 (122 N. W. 82), where the subjects involved are fully discussed.

A motion for a new trial was made and denied. It is contended that the verdict was against the weight of the evidence. We have examined this record with care; and, so far from concurring in the view of defendants' counsel, we must say that we think the plaintiff made an exceptionally strong case, and that the verdict of the jury was fully justified.

The judgment will be affirmed, with costs.

OSTRANDER, HOOKER, BROOKE, and BLAIR, JJ., concurred.

BAESSLER v. FOSTER.

INTOXICATING LIQUORS—CIVIL-DAMAGE ACT—EVIDENCE OF SALES—QUESTIONS OF LAW AND FACT.

No error was committed by the trial court, in an action for the death of plaintiff's husband, under the law regulating the sale of intoxicating liquors, in submitting to the jury as a question of fact whether liquor was sold by the defendant to the deceased on the night he was killed, where the testimony showed that he was drinking in the defendant's saloon at the time, and the witness and defendant might have seen the deceased from the position in which both were situated, although the facts were disputed.

Error to Newaygo; Davis, J., presiding. Submitted November 10, 1909. (Docket No. 141.) Decided February 3, 1910.

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Case by Anna Baessler against Frank Foster, principal, and Albert Brandt and John H. Canavan, sureties, under the civil-damage act. A judgment for plaintiff is reviewed by defendants on writ of error. Affirmed.

George E. & M. A. Nichols and *Smedley, Hall & Freeland*, for appellants.

Cogger & Broomfield, for appellee.

BLAIR, J. This is an action to recover damages sustained by plaintiff through the death of her husband, alleged to have been caused, or contributed to, by intoxicating drinks sold to him by defendant Foster. Defendant Foster was the keeper of a saloon in White Cloud, Newaygo county, and the other defendants are his bondsmen. The defendant's saloon was on the south side of Wilcox avenue. The building was about 18 feet wide. The first room from the street was the cigar room, separated from the barroom by a partition with two screen doors. The bar was at the east side of the barroom. South of the barroom was a cardroom in which drinks were habitually sold. This cardroom was formed by a partition running across from near the south end of the bar. At the west end of the partition an open archway was cut, from six to eight feet wide and about eight feet high.

Two witnesses testified to sales of liquor to plaintiff's intestate in the morning before his death. Defendant testified that the sales referred to occurred the morning before that stated by these witnesses. A witness testified that between 10 and 11 o'clock of the night in question he saw plaintiff's husband and one Whiteman standing at the bar, each with one hand on the bar and the other on a glass which appeared to contain lager beer. Whiteman and Foster denied this. Whiteman testified that he bought two glasses of beer by himself and took them back into the cardroom, where he gave one of them to Baessler, and they sat there at a table and drank their beer; that he did not tell Foster for whom he was pur-

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chasing the extra glass; and that he had been in the habit of buying two glasses of beer and taking them out through the cardroom and out the back way to his home near by. Foster testified: That Baessler came into the saloon between 9 and 10 and called for a drink; that he saw that he was a little intoxicated and refused him and sold him nothing afterwards.

"Then he stepped over by the stove, and talked with some one there, Whiteman or Morris Slade. I paid no attention to what became of him after that. I did not know that he and Whiteman were sitting in the back at the table. * * * One standing behind the bar could not tell who was in the cardroom. I couldn't see into that room at all, only a small corner of it where the stove was. I think the partition extended about five feet west of the bar between these rooms, so one would have to come from behind the bar out to the end of the partition before they could see into the cardroom. I remember of Whiteman coming into the barroom, and said he wanted two glasses of beer, and I drew them for him. I did not know what he was going to do with them. Before that he had got beer for his wife and taken it out of the back door. He lived back of my building. It was a frequent occurrence for him to come into the back door and get a pail of beer and take it home through that way, and he had also taken glasses of beer through that way. After I had refused Baessler the beer, I did not notice him again until I started to lock up. He was then sitting in the cardroom with Mr. Whiteman."

Plaintiff had judgment, and defendant brings the record to this court for review upon two propositions:

First. The court erred in practically withdrawing from the jury by the phraseology of his charge the question of fact whether Foster sold any liquor to Baessler in the morning. We think this contention rests upon a palpable misinterpretation of the charge.

Second. The court improperly submitted the question of alleged sales on the night of said day. The only branch of defendant's argument in support of this proposition which requires consideration is the contention that the court erred in submitting to the jury as a question of

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fact whether defendant could see Whiteman and Baessler in the cardroom. There was an abundance of evidence, if the jury gave credit to the witnesses furnishing it, to justify an inference that defendant Foster knew that Whiteman and Baessler were in the cardroom, and we think the question whether a person behind the bar at the north end could see Whiteman at the card table was also an open question for the jury. Defendant's witness Friedburg testified: That he and the witness Cannon were in the saloon talking with Foster for 20 minutes or half an hour between 9 and 10—

"We were at the north end of the bar. I saw Baessler sitting by a table in the cardroom. The barroom was separated from the cardroom by a partition with an archway cut through it. The archway is on the west side of the building. A stove was near the archway. I looked by the stove and into the cardroom, and saw Mr. Baessler and Mr. Whiteman sitting in there at a table. I think they could be seen from the north end of the bar. I don't know what they were doing. I saw two glasses standing on the table. * * * The barroom runs north and south through the building. The bar was on the east side of the saloon. Cannon and I were standing pretty well up towards the north end of the bar. From where we were we could see the table and any one sitting down there. I don't remember of Baessler or Whiteman getting up from the table while we were in there. The archway went clear to the ceiling. I should think the arch was about eight feet wide east and west."

The witness Cannon testified: That he was at the saloon—

"Between 9 o'clock or a little after. I saw Baessler in there. He was sitting at a table in the back room with Whiteman. There was no one else in the room with them. I was in the saloon for probably half an hour. I don't think that he came out of the back room while I was there. They were sitting at the table all the time. I don't know what they were doing. Baessler's back was to me. I couldn't tell whether they were drinking or not. Baessler did not come into the barroom while I was there. They were sitting in this back room when I first saw them,

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and remained there at the table until I left. * * * Ed. Friedburg and I went in together. I had met him on the street. * * * Foster was behind the bar. There was no one else behind the bar. I did not go into the back room at all. There is a big arch cut through between the barroom and the cardroom, and they (Baessler and Whiteman) sat just through the archway. This arch is about six or eight feet wide, and cut round, as I remember. It does not go up to the ceiling. I should think it was eight or nine feet high, making a space through the archway of six or eight feet wide and eight to nine feet high. That is open, so you can see into the rear room. I could see them from the front of the bar. I am sure it was Baessler and Whiteman in there. I didn't look in there very much, because I didn't pay any attention. If it hadn't been that the man was killed, I would not have remembered it. I did not see Whiteman or Baessler come out of the back room while I was there. Whiteman was facing east and Baessler to the south. I could not see Baessler's face. His back was to me. I know Mr. Whiteman had a glass in front of him. I couldn't see what Baessler had."

If, as this testimony indicates, Baessler and Whiteman "*sat just through the archway*" and witnesses at the north end of the bar but on the front or west side could see Whiteman at the west side of the card table "facing east" and Baessler at the north side of the card table facing "to the south," we think the inference that Foster behind the bar at the north end could at least see Whiteman is a reasonable one. It is apparent that, if the partition at the south of the bar extended out five feet to the west and the table at which Whiteman and Baessler sat was entirely behind the partition, Cannon and Friedburg could not have seen them at all.

We find no reversible errors in the charge, and the judgment is affirmed.

MONTGOMERY, C. J., and OSTRANDER, HOOKER, and BROOKE, JJ., concurred.

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PEOPLE *v.* WILLIAMS.

1. EVIDENCE — COLLATERAL ISSUES — CROSS-EXAMINATION — IMPEACHMENT.

   The prosecution is bound by the respondent's testimony on cross-examination relating to collateral matters, and cannot impeach him by showing that statements made by him relating to a distinct prosecution of a third person and not connected with the offense with which he was charged, were false.

2. CRIMINAL LAW—ARGUMENT OF PROSECUTING ATTORNEY.

   Facts of which the prosecuting attorney has personal knowledge should be presented to the jury by him as a witness, and not in his argument.

Exceptions before judgment from Hillsdale; Chester, J. Submitted November 12, 1909. (Docket No. 161.) Decided February 3, 1910.

Dennis Williams was convicted of larceny. Reversed.

Frank H. Hall and *Grant Fellows*, for appellant.

Paul W. Chase, Prosecuting Attorney, for the people.

MOORE, J. The respondent was convicted of the charge of larceny. He brings the case to this court on exceptions before judgment. It is claimed the larceny was from the person of Mr. Dillon; that he had on his person $75 in bills in the inside vest pocket. Towards evening he was in Boyd's saloon and claims he met one Clare Buck, who invited him to take a drink, which he declined; that he then went into a room off the barroom, called in the record a "wineroom;" that Buck came in and swung his arms around his neck and abstracted the roll of bills from his pocket; that he grappled with him and called, "Thief" and "Robber;" that

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soon after Buck was searched, and no money was found upon him. It is the claim of the people that the money was passed by Buck to one Vreeland before the search, and that there was a conspiracy between the respondent, Buck, and Vreeland to obtain the money and divide it between them.

Nearly all the testimony incriminating the respondent was given by Buck, who had pleaded guilty. Respondent contradicted the testimony of Buck and denied all connection with the robbery. Respondent, for the purpose of affecting the credit of Buck, introduced testimony of his neighbors, who testified, in substance, that they were neighbors of Buck, had the means of knowing his general reputation in that neighborhood for truth and veracity, and that it was bad. The people, for the purpose of impeaching respondent, were permitted to ask respondent, on cross-examination, if he did not on one occasion come to the officers and tell them that William Boyd kept prostitutes at his place and rented rooms to any one that wanted them. Upon his testifying that he was intoxicated on that occasion and did not remember what he told the officers, it was permitted of the people to show by one of the officers present that he was not intoxicated on that occasion, and that he did tell the officers that Boyd kept a house of prostitution and rented rooms for that purpose. The people were also permitted to read to the jury a complaint made by respondent charging Mr. Boyd and one Wilson with keeping a house of prostitution, and then to prove what respondent testified to on the examination of Boyd and Wilson on that charge. The admission of this testimony is assigned as error.

An examination of the record shows that the respondent was called as a witness in the examination of Boyd and Wilson. He was then asked the following question:

"*Q.* And isn't it a fact that you went back absolutely and under oath in justice court on what you had told the officers at the time you came to see them concerning William Boyd and his house of ill fame?"

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This was objected to, but the objection was overruled. The respondent answered.

"I don't remember now what I told them. I was sworn in justice court. I had been drinking on the day I made the complaint. I don't know what happened that night."

The witness was then asked the following question:

"*Q.* Isn't it a fact, Mr. Williams, at the time you called to see the officers concerning William Boyd's place, that you told the officers that William Boyd rented these rooms to any one that wanted them?

"*A.* I say I don't remember what I said at that time. I will not swear that I didn't say so. I did swear on the examination that I never knew him to rent rooms."

The sheriff, who had been previously sworn, was recalled in rebuttal, and testified that he had heard the testimony above referred to, and was asked the following question: "*Q.* What was his condition at the time he made that complaint?" This was objected to for the reason that the respondent had been interrogated about it, that it was a collateral matter, and that the people were bound by the answer. The objection was overruled, and Mr. Eggleston answered:

"He had been drinking, but he wasn't drunk. He knew everything that he was doing and walked off straight. * * * He said he kept a house of ill fame, and he wanted to make a complaint. He said they kept rooms to rent, and he took the money for it, and named different girls that stayed there for the purpose of prostitution. He named the girls and told that they were staying there pretending to be working, but there wasn't any of them working there. They came there for that purpose."

The people were also permitted to read to the jury the complaint made by respondent against Boyd and Wilson and to interrogate him with reference to the testimony given by him on the preliminary hearing in that case. The people were also permitted to interrogate the respondent as to what he swore to on the preliminary examination of Boyd and Wilson, and then to show by the sheriff that in

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a prior conversation he had made a statement contradictory to this testimony.

It is clear that the conversation with the sheriff in relation to another case could not be treated as an admission in this case, but related to an entirely different matter. In 1 Greenleaf on Evidence (15th Ed.), § 461, the following appears:

"(2) By general evidence affecting his credibility for veracity. But in impeaching the credit of a witness, the examination must be confined to his general reputation, and not be permitted as to particular facts, for every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer the other without notice; and unless his general character and behavior be in issue he has no notice. This point has been much discussed, but now may be considered at rest."

In a footnote to the above section, we find the following:

"The mischief of raising collateral issues is also adverted to as one of the reasons for this rule. 'Look ye,' said Holt, Ld. C. J., 'you may bring witnesses to give an account of the general tenor of the witness's conversation; but you do not think, sure, that we will try, at this time, whether he be guilty of robbery.' *Rex* v. *Rookwood*, 13 How. St. Tr. 211."

See *Driscoll* v. *People*, 47 Mich. 413 (11 N. W. 221); *McDonald* v. *McDonald*, 67 Mich. 122 (34 N. W. 276); *People* v. *Connelly*, 157 Mich. 260 (122 N. W. 80). When the prosecuting attorney asked the respondent what conversation he had with the officer with reference to the collateral matter of a complaint against Boyd and Wilson, the prosecuting attorney was bound by his answer and had no right to assail his credibility by proof of a different statement from him on this collateral matter.

Error is assigned upon the argument of the prosecuting attorney. Some of this assignment was based upon the testimony which we have already stated was inadmissible. A repetition of this portion of the argument is not likely to occur again.

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Error is assigned upon the following portions of the prosecuting attorney's argument:

"And I don't know, gentlemen of the jury, but what it is pretty near as near a credit to a man to be an inmate of Jackson State prison as it is to be an inmate to Bill Boyd's saloon. There isn't much difference. * * * There isn't much difference. And, understand, I am not asking a conviction here because Dennis Williams tended bar; I am not asking that. He could tend bar and be all right. I am not asking a conviction on that ground. But I say to you that the way Bill Boyd's place has been pictured out, it is one of the worst hell holes in Hillsdale county, and I say that Jackson State prison couldn't be a greater blot upon a boy's character than it does to be found in that resort for thieves and prostitutes. * * * Talk about putting a blot upon a young man's character, blot Dennis Williams? He is so covered with blots from his crooked deeds and his morals you couldn't find a white place on him."

The rule has been repeatedly stated that, if the prosecutor desires to get facts before the jury of which he has knowledge, they should be presented by him as a witness, and not by way of argument. As the case is to be reversed for the reason already stated, it is not necessary to decide whether the above argument of itself would be ground for reversible error. It will be very easy to avoid a like question in the new trial.

The conviction is reversed, and a new trial ordered.

OSTRANDER, HOOKER, BROOKE, and BLAIR, JJ., concurred.

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PEOPLE v. GIDDINGS.

1. CRIMINAL LAW—INTENT—SIMILAR OFFENSES—EVIDENCE—INTOXICATING LIQUORS.
   Where a respondent was charged with furnishing intoxicating liquors to one of a number of berry pickers, in violation of the local-option law, evidence of similar offenses relating to other berry pickers at about the same time is competent to show intent and to rebut any inference of mistake or accident.

2. SAME—INTOXICATING LIQUORS—LOCAL OPTION.
   It was error to admit testimony that another witness procured intoxicating liquor of the respondent's employé, out of a bottle on the person of the latter, the respondent being in no wise connected with the transaction.

3. SAME—LIQUOR FURNISHED TO GUESTS.
   Requested instructions to the jury were properly refused where they submitted the question whether the intoxicants were furnished to a guest, and the theory was unsupported by evidence on either side.

4. TRIAL—ARGUMENT—CRIMINAL LAW—SAVING QUESTIONS FOR REVIEW.
   The court will not consider error assigned on the argument of the prosecuting attorney, upon a record which shows no exception or objection made at the time.

Exceptions before judgment from Barry; Smith, J. Submitted November 15, 1909. (Docket No. 166.) Decided February 3, 1910.

Homer Giddings was convicted of violating the local-option law. Reversed.

Thomas Sullivan, for appellant.

William W. Potter, Prosecuting Attorney, for the people.

MCALVAY, J. Respondent was prosecuted and found

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guilty of furnishing intoxicating liquor to one James Foster in July, 1908, contrary to the provisions of the local-option law of this State which was at the time in force in the county of Barry, within which the claimed offense was committed. The case is here upon exceptions before sentence.

The errors relied on, and upon which respondent asks for a reversal, are as follows: (*a*) That the court allowed evidence tending to show other like offenses; (*b*) that the court erred in certain portions of the charge as given, and in refusing to give certain requests of respondent to charge the jury; (*c*) and as to certain language of the prosecutor, in an argument in the presence of the jury, upon a motion made in behalf of respondent to dismiss the case, and in not granting such motion.

The facts in the case necessary to state in this opinion were that respondent who lives in Kalamazoo was, during the season of 1908, in control of a certain huckleberry swamp in Barry county, for the purpose of picking and marketing berries, and had in his employ 20 or more persons who were Indians or of Indian descent, as berry pickers, and among their number one James Foster; that respondent occupied a tent on these premises, and the berry pickers, both men and women, occupied other tents in its vicinity. On the morning of the day in question, Foster went to respondent's tent outside of and near which was a stove set up used by respondent for cooking purposes. Near this stove was a table. Foster testified that he went to this tent to get a match to light his fire; that upon the table he saw a small bottle containing whisky, from which he poured a small quantity of the liquor, and went to the stove, where respondent then was, and respondent poured some hot water into the cup for him, and he drank the mixture. Foster says that he took the liquor of his own accord without any offer or request on the part of respondent. During the introduction of the case for the people evidence was admitted tending to show that, at or about the time of the alleged furnishing of the

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whisky to Foster, respondent furnished whisky and alcohol to others of these berry pickers. In his defense respondent denied that he ever furnished liquor of any kind to Foster, and never gave him any at the tent; that he brought no whisky to this tent, and did not remember that any whisky was there; that he had no clear alcohol, but did have a mixture of alcohol, ammonia, and glycerine for poisons and bee stings, and also a preparation known as "King of Pain" which he thought had alcohol in it, and of which he gave Inman Foster a dose when he was sick and exhausted. He also denied having sold any liquor to Sprague, one of the witnesses who testified to that effect. All of the testimony on the part of the people relative to any other offense was objected to. It is urged on the part of the people, and was claimed on the trial, that this testimony was admissible to rebut any presumption of accident or mistake in furnishing the liquor to James Foster, and as bearing upon the knowledge and intent of respondent in furnishing the liquor to Foster.

In the charge to the jury, the following request of respondent given by the court clearly shows his claim on this branch of the case:

"It is the claim of the defense that if James Foster got any intoxicating liquor at the Giddings tent, as alleged in the information, that he did so without the knowledge of Mr. Giddings, and I instruct you that Mr. Giddings would not be guilty of the crime charged against him in the case, providing you find that James Foster helped himself to the liquor which he claims to have taken at Giddings' tent, without the knowledge or consent of the respondent, Mr. Giddings. In other words, if James Foster took the liquor from a table by the Giddings tent without the knowledge or consent of Mr. Giddings, then your verdict will be not guilty."

As bearing upon the intent and knowledge of respondent, and to rebut the presumption of accident or mistake in furnishing this liquor, the testimony as to the furnishing or selling of these liquors by respondent to others was ad-

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missible. The court charged the jury relative to this testimony as follows:

"Proof has been offered by the people—and I would like to have very careful attention given to this—proof has been offered by the people and admitted in this case, of the furnishing of liquor by the defendant to other persons than James Foster, and you have a right to consider this proof as bearing upon the kind and character of the liquors furnished to Foster, he, the defendant, claiming that he had no whisky or alcohol at the tent, and that he furnished none to Foster nor to any other person.

"The defendant claims that if Foster obtained any liquor of him that he obtained it by his own act, and that the defendant did not co-operate with him, and you have a right to consider the proof of the furnishing of other intoxicating liquors by the defendant to other persons, if you shall find it was furnished by him, as tending to rebut any presumption which might otherwise obtain under the circumstances in this case that the liquor was procured innocently or accidentally of the defendant and without his knowledge, consent, approval or co-operation, and as tending to show that he knowingly and intentionally permitted Foster to obtain the whisky in question and co-operated with him in procuring it and preparing it for use. You should, however, gentlemen, bear in mind and keep it before you all the time in your consideration of the case, that respondent is being tried for furnishing liquor to James Foster and not to any one else, and the proof offered of other furnishing of liquor is for the purpose of establishing the furnishing to James Foster, and whatever you believe about the furnishing of liquor to any one else, you cannot and should not convict the respondent because of such furnishing, but, if convicted at all, he should be convicted of furnishing to James Foster in the manner and form as alleged in the people's information."

The purpose for which this proof was admitted and could be considered was clearly and correctly stated by the court.

This case comes within the exception to the general rule relied upon by respondent that proof of other offenses may not be admitted upon the trial of one accused of crime, being of that class of cases where the circumstances

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permitted the inference of accident, mistake, or inadvertence to be drawn. *People* v. *Burke*, 157 Mich. 113 (121 N. W. 282); *People* v. *Seaman*, 107 Mich. 348 (65 N. W. 203, 61 Am. St. Rep. 326), and cases cited. 1 Wigmore on Evidence, §§ 300–372. If this proof was admissible for any purpose, it would not be rendered incompetent because it might tend to show other violations of the local-option law by respondent. Such proof is never admissible as substantive proof of the act charged for which a respondent is being tried. Cases cited *supra*. *People* v. *Thacker*, 108 Mich. 652 (66 N. W. 562).

A witness on the part of the people was allowed, over objection and exception, to testify that he procured some alcohol there from a man named Holmes, employed by respondent in making berry crates. He testified on direct examination:

"Mr. Giddings did not furnish some alcohol to my wife at the time she was stung. I got that alcohol of Mr. Holmes. Mr. Holmes lived with Mr. Giddings. I do not know where he got this liquor in question. He did not get it out of Mr. Giddings' tent. He had the liquor in a half pint bottle. I supposed it to be alcohol."

This testimony does not connect respondent with this transaction. The fact that Holmes worked for respondent, and lived with him, and had some alcohol in his possession is not a circumstance tending to establish the knowledge and intent of respondent in furnishing liquor to Foster, for which he was being prosecuted. It was error to admit this testimony, and this court cannot say that it was not prejudicial and reversible error.

In view of a new trial which must be had, some other questions must be passed upon. One contention of respondent was that if liquor was furnished Foster by Giddings it was furnished to a guest and not unlawfully. There is nothing in the case which would warrant the court in giving a request to charge embodying that contention. This case is clearly distinguishable from the

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cases of this court relied upon by respondent. The court was not in error in refusing such request to charge.

The prejudicial language of the prosecutor, upon which error is assigned, was not objected to at the time, nor was it called to the attention of the court at any time. We cannot consider error so assigned. For the error pointed out, the conviction is reversed and a new trial ordered.

HOOKER, MOORE, BROOKE, and BLAIR, JJ., concurred.

PEOPLE *v.* GLAZIER.

1. EMBEZZLEMENT—INDICTMENT—PUBLIC OFFICERS—STATING CONCLUSIONS.

   An indictment against a State treasurer for embezzlement is sufficient which charges a statutory offense in the language of the statute without stating the evidence, although it alleges generally that the funds were unlawfully converted to the use of a bank of which he was the principal stockholder, where the idea of a lawful appropriation or deposit is negatived in the indictment.

2. SAME—PUBLIC OFFICERS—STATE TREASURER.

   Under 1 Comp. Laws, § 1189 *et seq.*, the State treasurer is liable as a bailee for State funds in depositories selected according to law.

3. SAME.

   It is unlawful for the State treasurer to deposit funds in a bank for any pecuniary inducement. 1 Comp. Laws, § 1201.

4. SAME—STATUTORY CONSTRUCTION.

   The intent of a general statute to modify a special act being plain, the rule that a subsequent general statute will not be held to modify a special statute is inapplicable.

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5. SAME—BANKS AND BANKING—STOCK AND STOCKHOLDERS—PUBLIC OFFICERS.

The fact that the inducement to the State treasurer to deposit money in a bank of which he was a principal stockholder consisted in the gain which he would indirectly receive, does not affect his criminal liability under 1 Comp. Laws, § 1201. *Board of Fire & Water Com'rs of Marquette* v. *Wilkinson*, 119 Mich. 655 (78 N. W. 893, 44 L. R. A. 493).

6. SAME—PLEADING—INDICTMENT AND INFORMATION.

The joinder in an indictment of several counts for the unlawful appropriation of different sums of money by the State treasurer is not objectionable, and may be treated as a specific statement of the successive acts constituting a single offense under 3 Comp. Laws, § 11614.

7. SAME—PUBLIC OFFICERS—INTENT.

A public officer who devotes funds in his custody to any other purposes than those which the law authorizes must account for them to his successor or be guilty of a felony under 1 Comp. Laws, § 1201, no matter how good his intentions may have been.

8. SAME—EVIDENCE—DEPOSITS BY CHECKS AND DRAFTS.

The checks and drafts by means of which money was deposited by the treasurer were admissible in evidence to show the unlawful appropriation of money charged in the indictment.

9. SAME—EVIDENCE—IMMATERIALITY.

No prejudicial error results from the admission, in a prosecution for embezzlement, of testimony to show the respondent's bad faith which was not a necessary element of the offense.

Exceptions before judgment from Ingham; Wiest, J. Submitted November 16, 1909. (Docket No. 83.) Decided February 3, 1910.

Frank P. Glazier was convicted of embezzlement. Affirmed.

A. J. Sawyer & Son (*L. B. McArthur*, of counsel), for appellant.

Walter S. Foster, Prosecuting Attorney (*Charles W. Nichols*, of counsel), for the people.

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BLAIR, J. Respondent was indicted upon presentment by a grand jury, charging him in 31 counts with violations of section 11612 of the Compiled Laws. All of the counts of the indictment are in the same form, except that some of them charge respondent, as State treasurer, with knowingly and unlawfully appropriating, at different times, to his own use, different sums belonging to the State, and in his custody as State treasurer. Certain counts charge the appropriations to be to the use of the Chelsea Savings Bank, while other counts allege an appropriation to the use of himself and the Chelsea Savings Bank jointly.

At the close of the testimony the prosecution elected to go to the jury upon the 10 counts, alleging, with proper variations of time and amount, as in the ninth count:

"That on, to wit, the day and year aforesaid, at, to wit, the city of Lansing, in the county of Ingham aforesaid, the said Frank P. Glazier, so holding the office of State treasurer as aforesaid, did knowingly, unlawfully, and feloniously appropriate to the use of the Chelsea Savings Bank, a body corporate under the laws of the State of Michigan, a large sum of money, to wit, the sum of $12,213.15, of the value of $50 and upwards, to wit, of the value of $12,213.15, the property of and belonging to the said State of Michigan, which had been received and was then held by him in his official capacity aforesaid as State treasurer of the State of Michigan, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

During his entire term of office as State treasurer, from January 1, 1905, till January 20, 1908, when he resigned, respondent was president, director, principal stockholder, chairman of the discount committee, and active manager of the Chelsea Savings Bank of Chelsea, a village of some 2,000 inhabitants. The capital stock of the bank was increased from $60,000 to $100,000 on December 28, 1905. For many years prior to 1905 the bank had been a State depository of public funds. Soon after January 1, 1905, and again soon after January 1, 1907, respondent

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entered into contracts with the bank, signed by himself as State treasurer, on the one hand, and as president of the bank, on the other hand, providing for the deposit of State moneys in said bank. In clause 2 of the contracts the bank agreed to reimburse and pay the respondent, as State treasurer, all such sums as might be deposited by him in said bank, "whenever called for," and to pay interest on daily balances, not to exceed 3 per cent. The interest actually paid was 1¼ per cent. The respondent also took from said bank various surety bonds aggregating $200,000, to secure performance of the contracts, such bonds being approved, as required by law, by the State treasurer, auditor general, and secretary of State. The bank was closed by the State banking department on December 2, 1907, at which time the balance of State moneys on deposit was $685,587.79, and the affairs of the bank passed into the hands of a receiver.

The remittances of the deposits were made by check or draft, except in the case of the $23,000 deposit of November 13, 1907, in which case $3,000 of such deposit was in currency. The checks or drafts were of two classes: One class being drawn upon various Detroit banks, and being in each instance signed by the deputy State treasurer, and the other class being miscellaneous checks or drafts drawn to the State treasurer or other State officers for taxes and other demands due the State, which found their way into the State treasury, and which were in turn indorsed over to the Chelsea Savings Bank. The former class were checks drawn by the deputy State treasurer upon other State depositories, while the latter class were mere private checks or drafts which had been received by the State and made payable to the Chelsea Savings Bank by indorsement. Since the receiver has had charge of the affairs of the Chelsea Savings Bank he has repaid to the State, upon account of the State funds deposited in the bank, two dividends, one on May 6, 1908, of $205,745.34, and another on October 21, 1908, of $70,879.77. There has also been paid to the

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State by one of the bonding companies, upon the bond of the Chelsea Savings Bank as a State depository, the sum of $50,000. The affairs of the Chelsea Savings Bank were still in the hands of a receiver at the time of the trial.

The respondent was the owner of 668 of the shares of stock, or a little more than two-thirds of the entire capital stock of the bank, and thereby empowered to elect the entire directorate of the bank, and entitled to two-thirds of the profits of the business. He was also the president and principal owner of the Glazier Stove Company, an extensive manufacturing institution, and was interested in other business enterprises which necessitated the borrowing of large sums of money. The evidence demonstrates that he was not using the public moneys with sole reference to the public interests, but largely for the support of his banking business and in aid of the other institutions in which he was interested. Respondent was financially interested in the Ann Arbor News Publishing Company, the Blanchard Wool Company, and the Chelsea Grain & Produce Company. Through Martin J. Walkenhut, as agent, he was engaged in the business of buying wool on his own account. During 1906 and 1907 he practically rebuilt and greatly extended the stove plant, and constructed a large office building in Ann Arbor, costing, complete, about $165,000. He spent about $30,000 on the Blodgett Terrace in Detroit, and built an expensive cottage at Cavanaugh Lake, near Chelsea.

The board of directors of the bank took no action requesting the deposit of State moneys in the bank, and the cashier testified that he did not know how they came to be deposited. The deputy State treasurer testified that the deposits were made by direction of respondent, either verbally or over the telephone. On January 9, 1906, the following persons were elected directors, viz.: F. P. Glazier, William J. Knapp, William P. Schenck, V. D. Hindelang, J. W. Schenck, Fred Wedemeyer, Adam Eppler, H. I. Stimson, Theodore E. Wood. At a meet-

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ing of the board of directors, April 9, 1906, the following occurred:

"Motion made that loans to the extent of 20 per cent. of capital and surplus be extended to the Chelsea Grain & Produce Company, Glazier Stove Company, and such other firms as the president thought best to extend loans. No further business; the meeting adjourned."

At the annual meeting of January 8, 1907, F. P. Glazier, William J. Knapp, William P. Schenck, Adam Eppler, H. I. Stimson, Theodore E. Wood, J. W. Schenck were elected directors. At the meeting of the board of directors, January 14, 1907, the following occurred:

"Motion made that loans to the extent of 20 per cent. of the capital and surplus be extended to the Glazier Stove Company, Chelsea Grain & Produce Company, and such other firms as the president thought best to loan to. Carried."

At the directors' meeting of April 15, 1907, the following occurred:

"A motion was made by director Knapp, supported by Director Stimson, that Mrs. Henrietta M. Glazier be extended loans to 20 per cent. of the capital and surplus. Carried unanimously. A motion was made by Director Knapp, and supported by Director J. W. Schenck, that Harold P. Glazier be extended loans to 20 per cent. of the capital and surplus. Carried unanimously. A motion was made by Director Stimson, and supported by Director J. W. Schenck, that Vera G. Glazier be extended loans to 20 per cent. of the capital and surplus. Carried unanimously. A motion was made by Director J. W. Knapp, and supported by Director Wood, that Saxe C. Stimson be extended loans to 20 per cent. of the capital and surplus. Carried unanimously. A motion was made by Director Wood, and supported by Director Stimson, that W. P. Schenck be extended loans to 20 per cent. of the capital and surplus. Carried unanimously. A motion was made by Director Knapp and supported by Director W. P. Schenck, that F. P. Glazier be extended loans to 20 per cent. of the capital and surplus. Carried unanimously."

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At the directors' meeting of September 9, 1907, the following occurred:

"Motion by Director H. I. Stimson, supported by Director W. J. Knapp, that John W. Schenck be extended loans to 20 per cent. of the capital and surplus. Carried unanimously. Motion made by Director W. J. Knapp, supported by Director J. W. Schenck, that Emily J. Glazier be extended loans to 20 per cent. of the capital and surplus. Carried unanimously. Motion made by Director T. E. Wood, supported by Director H. I. Stimson, that Adelia A. Comstock be extended loans to 20 per cent. of capital stock and surplus. Carried unanimously."

During 1906 and 1907 the Chelsea Savings Bank loaned to the Glazier Stove Company $215,000. There was unpaid on these loans when the bank was closed a note of $100,000 secured by the stove company's stock. There was loaned to the Chelsea Grain & Produce Company $58,000, the notes being secured by warehouse receipts for wool, upon which had been collected, at the time of the trial, all but $8,000. There was loaned to Walkenhut, nominally, but really to respondent, $25,448.45. There was paid on these notes about $10,630.

The following is a list of loans made by the Chelsea Savings Bank during 1906 and 1907 on notes payable to said bank, and for which the respondent received the credit upon the books of said bank, and all of which were personally discounted by him:

Date of Discount.	Maker.	Amount.
1906.		
April 5.	Ann Arbor News Pub. Co.	$18,000
May 18.	Frank P. Glazier	10,000
June 7.	Frank P. Glazier	5,000
Aug. 13.	Frank P. Glazier	20,000
Aug. 29.	Frank P. Glazier	5,000
Sept. 20.	Frank P. Glazier	5,000
Oct. 16.	Frank P. Glazier	5,000
Dec. 15.	Frank P. Glazier	5,000
1907.		
Feb. 21.	Frank P. Glazier	20,000

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Date of Discount. 1907.	Maker.	Amount.
May 21.	Frank P. Glazier	80,000
June 22.	Frank P. Glazier	5,000
Oct. 26.	Frank P. Glazier	100,000
July 18.	Frank P. Glazier	5,000
Sept. 5.	Frank P. Glazier	5,000
April 19.	Henrietta M. Glazier	30,000
April 19.	Vera G. Glazier	28,000
April 19.	Harold P. Glazier	28,000
April 19.	Saxe C. Stimson	35,000
May 13.	H. I. Stimson	5,000
June 1.	W. P. Schenck	20,000
Sept. 19.	W. P. Schenck	15,000
Nov. 18.	W. P. Schenck	5,000
June 26.	John W. Schenck	15,000
Sept. 16.	John W. Schenck	10,000
Oct. 2.	John W. Schenck	10,000
Nov. 18.	John W. Schenck	5,000
May 2.	Anna P. Tichenor	5,000
Total		$499,000

All of the notes given by respondent were paid during 1906 and 1907, except the two notes of $80,000 and $100,000, respectively. There was paid upon the Henrietta M. Glazier, Vera G. Glazier, and Harold P. Glazier notes the sum of $30,000. None of the other notes were paid, either in full or in part. The only notes secured by mortgage or collateral were the two notes of respondent for $80,000 and $100,000, respectively. The only note which bore the name of an indorser was that of Harold P. Glazier. All of these notes, except the respondent's, which were paid, and the Ann Arbor News Company, were given for either three or five years. The mortgages securing the loans of respondent above mentioned were not recorded until after the bank had closed its doors. Neither of these mortgages was approved by the board of directors until November 25, 1907. All of these notes were considered by the cashier, Mr. Wood, as they in fact were, the obligations of respondent. The note and mort-

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gage of $100,000 were dated July 15, 1907, but were not entered on the bank's records until October 26, 1907. The grand total of loans made by respondent and the few institutions in which he was financially interested, during the years 1906 and 1907, was $880,573.42. Of this there remained unpaid when the doors of the bank were closed, including the $20,000 loan of respondent in 1905, the sum of $527,317.49. Henrietta Glazier is respondent's wife; Harold and Vera Glazier, respectively, his son and daughter.

In the treasury department accounts with depositories are classified as "active" where the accounts are constantly fluctuating by deposits and withdrawals, and "non-active" where the treasurer only checks against them to a limited extent. The Chelsea Savings Bank's account was classed as active, although the record does not disclose that the treasurer drew a check against it during 1906 and 1907. During 1907, for the greater portion of the time, there was a deficit in the bank's legal reserve fund, which was taken care of, from time to time, by deposits of State funds. It appears to us to be a necessary conclusion from the evidence in the record that respondent completely dominated and controlled this bank, and that the board of directors, when it acted, merely registered his will.

At the conclusion of the proofs submitted on the part of the people, counsel for respondent moved the court to direct a verdict of not guilty, and also moved the court to discharge the respondent because of the insufficiency of the indictment. These motions were overruled by the trial judge, whereupon the respondent rested his case without offering any proof. The case is brought to this court upon exceptions before sentence.

The errors relied upon by counsel for respondent have been classified by them in their brief, and we consider them in their order.

1. Insufficiency of the Indictment. The substance of

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the contention that the indictment was insufficient is, as stated in the brief:

"That the indictment does not set forth the facts which make the appropriation of the money of the State to the use of the Chelsea Savings Bank unlawful, but that the indictment charges only a conclusion drawn by the pleader from undisclosed facts, and that the indictment is insufficient and in violation of respondent's constitutional privilege to be informed of the nature of the accusation against him."

It is generally sufficient to charge a statutory offense in the language of the statute, and to state the crime charged, and not the evidence thereof. The principal, if not the only, exceptions to this rule are where the statutory definition of the offense does not include all of its elements, or "where the words of the statute may by their generality embrace cases which, while falling within its literal terms, are not within its meaning or spirit." *People* v. *Taylor*, 96 Mich. 576 (56 N. W. 27, 21 L. R. A. 287); *People* v. *Butler*, 122 Mich. 35 (80 N. W. 883).

It is conceded by respondent's counsel, that an information under this statute, alleging an unlawful appropriation to his own use, or to the use of anybody else except an incorporated bank, would be valid, the reason stated for such concession being that such alleged appropriations would appear to be illegal on their face, while an allegation of an unlawful appropriation to a bank would appear upon its face to be an averment of doing a lawful act unlawfully, and, consequently, it must be averred wherein the unlawfulness consists. We do not think that this statute can be split up into fragments; it must be construed as a whole. It being conceded, and we think properly, that it states the elements of the offense of unlawful appropriations generally, and the section not making any exceptions in terms, it must be held to cover any unlawful appropriation for which a conviction may be had under the statute and to justify an information describing the offense in the language of the statute. The language of

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the statute as used in the information excludes the idea of a lawful appropriation or deposit; and, unless it is to be held that there can be no unlawful appropriation of money under this statute to a State bank under any circumstances, the nature of the unlawful act is a matter of proof which need not be averred in the information.

2. Sufficiency of the Proofs. In determining whether the proofs support the verdict of the jury, it becomes necessary to determine at the outset an important question of law raised by respondent's contention that section 1201, 1 Comp. Laws, does not apply to his deposits in the Chelsea Savings Bank. Upon this question the trial judge instructed the jury as follows:

"The purpose or intent of respondent in what he did may be gathered from what was done by him, provided the inference showing such intent clearly appears, and it is not reasonable to give his acts any other purpose than a criminal purpose. Unless one expresses his purpose or intention in doing an act, he leaves the same to be determined from what he does. So in this case you may consider the evidence of what the respondent as State treasurer did with the funds of the State so far as his acts with the same relate to their deposit in and use by the Chelsea Savings Bank. And from all of his acts and doings about the same, so far as disclosed by the evidence, you are to determine whether his purpose was to give the bank the use of the same, and thereby as a stockholder bring to himself a pecuniary advantage. If such was his purpose, it was criminal.

"Whether he received such pecuniary return from their use or not, it was unlawful for him to give to a bank in which he was a stockholder the use of State funds in his hands as State treasurer, and if he sent, or caused such funds to be sent, to such bank through the hope and expectation of the bank profiting out of the use it could make of them, and thereby bring a pecuniary advantage to himself, he did an unlawful thing, and such unlawful purpose and unlawful and knowing appropriation of State funds would make out the offense charged against him.
* * *

"Neither is it necessary that you find the bank made any profit out of such funds, if any were so deposited.

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The law prohibited him from applying the funds of the State, coming to him in his official capacity as State treasurer, to any other purposes than the legal ones for which such funds came to him, and this made it unlawful for him to apply such funds to the use of the Chelsea Savings Bank, if he did so, if he was a stockholder therein; and, if he was a stockholder therein and a director and a president thereof when he made such deposits of State funds therein, and was led to do so that the Chelsea Savings Bank have the use of such funds, and he as a stockholder therein hoped to gain a pecuniary advantage from their use by the bank, or intended as a stockholder, director, and president of such bank to manage such funds to his pecuniary advantage, or to the pecuniary advantage of the bank, then their deposit was not only unlawful, but knowingly made and with felonious intent.

"The unlawful appropriation of public money by the State treasurer to the use of another is not condoned by the fact, if it is a fact, that security was taken for its return, or it was believed it would be paid back upon demand. The unlawful appropriation takes place, if at all, when the State treasurer sets apart or diverts the money to an unlawful use. Even though he believed the money would be returned, yet the offense is complete upon an unlawful appropriation, knowingly made and with a felonious intent."

The argument of respondent's counsel, briefly stated, is:

(a) Act No. 105, Laws 1855 (sections 1189, 1190, 1 Comp. Laws), is a special statute, conferring upon the State treasurer, auditor general and secretary of State the power to create a State depository, and placing upon the State treasurer the duty to deposit in such depositories the surplus funds of the State. Act No. 131, Pub. Acts 1875, "to provide for the safe keeping of public moneys" (sections 1197–1204), is a general statute, and "in such a case the general statute must give way to the special prior statute." If section 1201 applies to State depositories created in pursuance of the statutory formalities, "then the two statutes are in conflict, or at least cover the same matters; and, under the rule just quoted, the subsequent general statute must be held not to apply to the matters covered by the special statute."

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(*b*) The Chelsea Savings Bank is to be treated as *a distinct legal entity*, and respondent could not offend "either the spirit or letter of the law by making deposits in such a bank, as in legal contemplation the Chelsea Savings Bank was a person entirely foreign to himself. He could have been guilty of *receiving an inducement* for making such deposits, but this is an entirely different question."

(*c*) Penal statutes must be construed strictly, and cannot be extended by implication; and, so construed, section 1201 must be limited to a direct bribe or promise preceding the deposit of public money. The act of receiving the inducement is entirely distinct from the act of making the deposit.

a. Section 78 1 Comp. Laws, requires of the State treasurer a bond conditioned that—

"The said treasurer shall use all necessary and reasonable diligence and care in the safe keeping and lawful disposal of all sums of money * * * which have or shall come to his hands or to the hands of any person or persons employed by him; and that the said treasurer shall, upon reasonable notice, render a true account in the premises whenever * * * and shall deliver over to his successor in said office, or to any other person authorized by law to receive the same, all moneys, books, bonds, notes, papers and all other things belonging to said office; and that all balances which shall appear against him, shall be forthwith paid into the treasury of the State."

In *Perley* v. *County of Muskegon*, 32 Mich. 138 (20 Am. Rep. 637), Mr. Justice CAMPBELL, reading for the court, said, *arguendo:*

"The statutes of this State and of the Territory have generally distinguished between the State and county funds, providing specifically for the deposit or preservation of the former, and leaving the latter to be dealt with and accounted for differently. In 1829 the Territorial treasurer was required to keep a bank book showing receipts and moneys drawn, and no money could be checked out except by checks countersigned by the auditor, and all moneys were to be deposited within three days after re-

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ceipt, and such deposit exonerated the sureties. 2 Terr. Laws, p. 743. The legislation since the State was organized has in like manner recognized bank deposits of State money, and has frequently regulated the subject. See Laws 1835–36, pp. 8, 9, 43, 61, 62, 63, 148; Rev. Stat. 1838, pp. 29, 90, 98; Laws 1839, pp. 58, 120; Laws 1853, pp. 71, 88; Laws 1855, p. 238; Laws 1861, pp. 150, 583; Laws 1863, p. 351. It is contemplated that all State funds shall remain specifically, either in the State treasurer's office, or as deposits in bank, so that they can be counted monthly. Laws 1861, p. 31. And on the vacancy of the office by resignation, limitation, or death, the moneys, as well as other property in the treasury, are to be taken possession of specifically by the State officers. 1 Comp. Laws 1871, p. 160. There is no State money the title to which passes to the treasurer individually. His whole dealing with it is official and specific. * * *

"We have found no decisions in other States upon the liability of State treasurers, but our own statutes have distinguished them to some extent as suggested, and their duties are usually such as to require constant attention, whereas many of the local officers have very light official duties, and are differently situated as to banks and other instrumentalities of finance."

The question whether the liability of the State treasurer for the moneys of the State was that of a bailee or of a debtor or insurer was not involved in that case, but the inference to be deduced from the language quoted is that, in his opinion, the liability of the State treasurer was that of a bailee. We agree that the liability of the State treasurer under his bond is not that of an insurer, and that the measure of his obligation is the use of "all necessary and reasonable diligence and care in the safe keeping and lawful disposal of all sums of money," etc. It does not follow, however, that the treasurer has fully discharged his obligation by the use of such diligence and care in the selection of a depository and the requiring of good and ample security for the safe keeping of the funds of the State. On the contrary, we are of the opinion that the duty to exercise all necessary and reasonable diligence and care to safeguard the funds of the State remains with the State

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treasurer after the selection of the depository and receiving ample security. This results from the provisions of the statute itself authorizing the creation of State depositories. This statute contains two effective sections; the first two having become ineffective. Section 3 (1 Comp. Laws, § 1189) provides as follows:

"The State treasurer is hereby further instructed to require of any bank, before he shall have made it a depository of surplus funds belonging to the State, good and ample security, to be approved by the said State treasurer, the auditor general and the secretary of State, for the safe keeping and reimbursement of such surplus funds, whenever called for, and the payment of such rate of interest as the State treasurer, in his discretion, shall deem best for the interest of the State."

Section 4 (1 Comp. Laws, § 1190) reads:

"Nothing herein contained shall be held or considered as in any manner changing or affecting the liability of the State treasurer or his bail, or his or their bond to the State."

It is clear that, under this section 4, the liability of the treasurer upon his bond remains unchanged, and is to be considered as though the statute relative to depositories had never been passed. In the eye of the law the funds in the State depositories are still in the treasury of the State, and subject to the control of the treasurer. *People* v. *McKinney*, 10 Mich. 54. The auditor general and secretary of State have no voice in the selection of the depository; their action is limited to determining whether the bond required of the bank by the State treasurer is good and ample security before "he [the State treasurer] shall have made it a depository," etc. The length of time the money shall remain in the depository and the rate of interest to be paid are alike subject to the uncontrolled discretion of the treasurer. Under the statute, and by the terms of the contract, the bank is bound to return the State's money "whenever called for," and the treasurer may check out the fund at pleasure. If it were the fact

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that the law conferred upon the State treasurer, auditor general, and secretary of State the power to create a single State depository, and made it the duty of the treasurer to deposit the State's surplus funds therein, there might be force in respondent's argument, but such is not the case. The depositories are selected by the treasurer, and he may select any number of such depositories.

"He may place a portion of the funds in bank in such place as in his opinion the public interest or the convenience of disbursement may require." *People* v. *McKinney*, 10 Mich. 87.

Furthermore, there is no duty resting upon the treasurer to create any depositories at all, or to deposit any funds in them after creating them. He may keep all of the funds within the treasury proper, if he so desires. If the State treasurer's deposits in banks from which he had received pecuniary inducements were lawful deposits therein prior to the act of 1875, which we are far from conceding, we have no doubt that it was the purpose of that act to modify and limit his right to make such deposits to banks from which he had received no pecuniary inducements. Section 1 of the act (1 Comp. Laws, § 1197) provides:

"*The People of the State of Michigan enact*, That all moneys which shall come into the hands of any officer of the State, or of any officer of any county, or of any township, school district, highway district, city or village, or of any other municipal or public corporation within this State, pursuant to any provision of law authorizing such officer to receive the same, shall be denominated public moneys within the meaning of this act."

Section 5 (1 Comp. Laws, § 1201) reads:

"In no case shall any such officer, directly or indirectly, receive any pecuniary or valuable consideration as an inducement for the deposit of any public moneys with any particular bank, person, firm or corporation."

The treasurer is the principal "officer of the State" receiving public moneys, and it was clearly the intention of

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section 5 to prohibit him from depositing such moneys with *any particular bank* for a pecuniary inducement. The intent of the general statute to modify the special statute being clear, the rule of construction relied upon does not apply. *Regents of University of Michigan* v. *Auditor General*, 109 Mich. 134 (66 N. W. 956).

b. The fact that the inducement to respondent consisted of the gain which he would indirectly receive through his interest as a stockholder, and not through the direct action of the legal entity, is not material, since the statute provides for such indirect inducements.

c. The decision of this court in *Board of Fire & Water Com'rs of Marquette* v. *Wilkinson*, 119 Mich. 665 (78 N. W. 893, 44 L. R. A. 493), disposes of this point, as we think in principle it disposes of all other questions raised as to the applicability of section 1201 to this case.

3. Joinder of Counts.

"As relates to the time of the commission of such offenses, the indictment in this case places the respondent on trial for 28 separate and distinct offenses, requiring in each case proof of entirely distinct transactions. The several amounts charged to have been appropriated have no relation to each other, and the several counts were drawn for the express purpose of charging 28 different crimes committed on as many different days, covering a period of nearly two years. The offenses covered by the indictment could have been returned in 28 separate indictments instead of 1."

We consider this point to be disposed of by the case of *People* v. *McKinney*, 10 Mich. 54. If we have correctly interpreted the law, it was unlawful for respondent to deposit any of the State's money in the Chelsea Savings Bank, and his deposits therein may properly be considered as a continuing series of unlawful acts all flowing from the one preconceived design to use the State's money for the benefit of himself, his institutions, and his bank. This construction receives support from the language of section 3 of the act (3 Comp. Laws, § 11614), viz.:

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"A failure or refusal of any public officer to pay over and deliver to his successor all moneys and property which should be in his hands as such officer shall be *prima facie* evidence of an offense against the provisions of section 1 of this act."

It will be noted that the failure "*to pay over * * * all moneys and property which should be in his hands*" is made *prima facie* evidence of the offense. It must therefore be proper to allege and prove the total of the sums deposited and converted. In our opinion the technically proper form of the information in this regard would be as in the case of *People* v. *Seeley*, 117 Mich. 263, *vide* page 264 (75 N. W. 609). But this being so, there can be no legitimate objection to alleging the conversion of the items making up the total in separate counts serving really as a bill of particulars.

In *People* v. *McKinney*, *supra*, the State treasurer, by arrangement, drew at the same time six drafts upon the receiver of a railway company for portions of the specific tax due from the company; the drafts being payable at different dates, and their sum total being the amount of the tax. The drafts were accepted, and were paid as they fell due. After the acceptance of the drafts, they were indorsed by the State treasurer, discounted at a New York bank, and the amount thereof placed to his credit as State treasurer in said bank. The information counted in separate counts upon the embezzlement of the respective amounts of the several drafts as they were paid. In discussing this information, the court said:

"And therefore, where the several offenses charged, though distinct in point of law, yet spring out of substantially the same transaction, or are so connected in their facts as to make substantially parts of the same transaction or connected series of facts, the defendant cannot be prejudiced in his defense by the joinder, and the court will neither quash nor compel an election." *Vide* pp. 94, 95.

See, also, *People* v. *Elmer*, 109 Mich. 493 (67 N. W. 550).

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4. Knowledge as an Element of the Offense. In our opinion the adverb "knowingly" used in the statute was intended to exclude from the definition of the offense mistakes of fact, accidents, such as the loss of the money by fire or other casualty, or inadvertent appropriations. *McGuire* v. *State*, 7 Humph. (Tenn.) 54. The principal elements of the offense are:

(1) The receipt of public moneys by a public official entitled to receive them.
(2) The appropriation of the moneys, knowing them to be public moneys, to a use which, as a matter of law, is unauthorized.
(3) The failure or refusal to pay over the money, which he ought to have on hand.

The provisions of section 11614, 3 Comp. Laws, plainly imply that a felonious intent is not an element of the crime. In our opinion it was the intention of the legislature to provide that any public officer, who devoted the public funds in his custody and control to any other purposes than those to which the law authorized their appropriation, must account for them to his successor, or be guilty of a felony, no matter how good his intentions may have been. *People* v. *Warren*, 122 Mich. 504 (81 N. W. 360, 80 Am. St. Rep. 582). Under this statute the public officer uses the public funds for an unauthorized purpose at his peril. If he is able to account for them at the proper time, he incurs no criminal responsibility under this statute, however bad his motives, but can only be prosecuted for the offense described in section 1201, or under the general embezzlement statute. If he is unable to account, he is criminally responsible, however good his motives.

5. Admissibility of Checks and Drafts Under Allegations of Indictment Charging Appropriation of Money. The method pursued in making the deposits, as a general rule, was for the deputy State treasurer to draw a check, on some bank where the State had a deposit, payable to the Chelsea Savings Bank, by which bank it was indorsed

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over to some bank in Detroit where it had an account; the Detroit bank being charged with the amount of the remittance. This account was then checked against by the Chelsea Savings Bank. The checks were merely the means through which the money was appropriated to the bank, and were so treated by the bank. The money was appropriated to the bank as much as though the currency had been sent there, and it was the duty of the bank to account for the money, which it should have had on hand. Moreover the point is within the principle of *People* v. *McKinney, supra.*

6. Errors in Admitting and Rejecting Evidence. The errors referred to, for the most part, relate to the rejection of testimony offered as tending to show the good faith of respondent. As we have held that the good faith of respondent was wholly immaterial, there was no error committed in this regard. Under the view we have taken of the law, it is true, as claimed by counsel for respondent, that respondent's unofficial transactions with the bank were immaterial, but under their construction of the law they were material. All that was necessary for the people to prove was the unlawful deposit of the money and the failure to account for it. These facts were conclusively proved by the undisputed evidence, and the admission of the testimony complained of was without prejudice.

The other errors argued in the briefs which merit consideration are disposed of by what we have already said in this opinion, and do not require separate consideration.

The exceptions are overruled, and the record remanded for further proceedings in accordance with the law.

OSTRANDER, HOOKER, MCALVAY, and BROOKE, JJ., concurred.

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In re KENNEDY'S ESTATE.

1. WILLS—EVIDENCE—DECLARATIONS OF DECEASED — PAROL EVIDENCE RULE.
   A will executed by the testator in due form and properly witnessed, may not be shown to be inoperative by testimony as to declarations of the deceased that he did not intend it to be a final disposition of his estate.

2. SAME—PUBLICATION.
   No publication of a will is required to give it effect in Michigan.

3. SAME—REVOCATION.
   Placing the will out of the possession of the testator does not place it beyond his control to revoke by another instrument.

4. SAME—SUBSCRIBING WITNESSES—STATUTORY REQUIREMENTS.
   The mere failure of a subscribing witness to remember whether or not the will was subscribed by him in the presence of the other witness does not raise a question of fact for the jury, where he states that he has no recollection at all about the transaction, but that the signature is genuine.

5. SAME—UNDUE INFLUENCE—DECLARATION OF TESTATOR.
   Statements made by the testator that he was being hounded to make the will are inadmissible to prove undue influence.

Error to St. Clair; Law, J. Submitted November 18, 1909. (Docket No. 25.) Decided February 3, 1910.

Lawrence O'Neil, administrator, presented for probate the last will and testament of Thomas Kennedy, deceased. The will was allowed in the probate court, and James J. Kennedy and others appealed to the circuit court. A judgment for proponent on a verdict directed by the court is reviewed by contestants on writ of error. Affirmed.

David Fitzgibbon and *John B. McIlwain*, for appellants.

Walsh & Walsh, for appellee.

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BLAIR, J. Thomas Kennedy died in the spring of 1908. In 1897 he signed a paper in the form of a will. The paper was drawn by John L. Black, and he and his nephew, Clare R. Black, are the witnesses. This paper was allowed in the probate court as the last will and testament of Thomas Kennedy. An appeal was taken to the circuit court by the brothers of deceased. The case rested on the testimony of the two subscribing witnesses, whereupon the circuit judge directed a verdict sustaining the document as the last will and testament of Thomas Kennedy, deceased. The contestants, his brothers, appeal and contest on the ground that the paper was not executed to operate as a will and not executed as required by the statute.

John L. Black testified that he was an attorney at law, and, up to January 1, 1897, had been judge of probate; that he drew the will in question, February 11, 1897; that, at Mr. Kennedy's request, he locked the door so that they should not be interrupted.

"I remember that will being signed by Thomas Kennedy. I saw him sign it.

"*Q.* In the presence of yourself and Clare R. Black?

"*A.* I cannot remember about Clare, but I remember myself; I did not know Clare was a witness to it until I saw it here in probate court. As a matter of memory I could not recall who it was that signed it besides myself. He writes a little different but have no doubt but that is his signature. I recall that Thomas Kennedy signed the will in my presence and that I signed it in his presence, at his request. I was well acquainted with Mr. Kennedy. He was in good bodily and mental condition at the time he signed it; no question about it in my mind.

* * *

"*Q.* Just state to the jury what he said he wanted.

"*A.* Why, he wanted some paper; he was having trouble out there with the boys, as he put it, and they were making him a good deal of trouble and insisting upon knowing what he was going to do with his personal property, and I think at the same time he told me that he had already disposed of his real estate; that is the way I un-

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derstood him, and he said they kept at him and kept hounding him all the time and that he wanted me to draw some kind of a paper that would be a peacemaker, that he could take out home. I told him at that time, 'Mr. Kennedy, you don't have to make any kind of a paper, you are too old a man to make any kind of a paper,' and he said to me, as I remember it, 'You don't know the conditions out there as well as I do,' and we talked it over one way and another. First we talked about a bill of sale, and I told him, if I remember right, some kind of a paper he had in mind that it was going to be a dangerous paper, and then he talked about putting it in the form of a will. I said that would be better because 'You can destroy it any time.' So I drew him up a paper, the paper that is here, and he signed it. * * * He said it was not a will; that at some future time he would draw a will.

"*Q.* Did you have any talk at that time with him about keeping it in your safe?

"*A.* Yes, I insisted, I said, 'Mr. Kennedy, leave that with me, don't take it out there; and if you don't want it, why, if anything should happen you, I could destroy it for you,' but he said, 'No; he would have to take it out there as a peacemaker.' * * * He went over pretty near the history of his life with me because I was at him for being so foolish as to sign a paper that he didn't want to sign. * * *

"*Q.* He told you he had made some disposition of his real estate at that time? * * *

"*A.* Well, he told me in a general way that he had made a disposition and that he wanted that put in the will that he had made a disposition of his real estate, in that paper there that he had made a disposition of his real estate during his lifetime.

"*Q.* And you put that clause in here?

"*A.* I put that clause in."

That the ink of Clare R. Black's signature was of a lighter hue than that used by Mr. Kennedy and himself; that he did not sign the paper as an instrument intended to become operative as a will, and, so far as he knew, neither did Clare R. Black; that from the time he drew the paper until the time Mr. Kennedy left the building with it he was constantly with him; that Clare R. Black might have signed the will as a witness in the presence of Mr.

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Kennedy and himself and he might have taken the will into Clare R. Black's office and he have signed there.

"*Q.* But you told me a minute ago that the will and yourself—that you were with the will all the time until the old man took it away that day?

"*A.* Yes, sir.

"*Q.* For you do not remember taking it away from the old man in next door?

"*A.* No, I do not; and I don't remember of Clare coming in there either."

Clare R. Black, a practicing attorney, testified to the genuineness of his signature:

"*Q.* Now, Mr. Black, you state now that you have no memory of ever being called upon to witness any other will, except that one of Mr. Atkinson's prior to your becoming a member of the bar?

"*A.* No, sir.

"*Q.* If you had been called into the office of John L. Black and it had been made known to you either by Mr. Black or by Mr. Kennedy that Mr. Kennedy was making his will and he had signed it or was going to sign it and wanted you and Mr. Black to witness it or wanted you to join with Mr. Black to witness it, and you did so join with him in witnessing it; what do you say whether you would have remembered it?

"*A.* I believe I would have.

"*Q.* What do you say now as to whether any such transaction as that occurred in February, 1897, in connection with the execution of the document presented here as a will?

"*A.* As to whether I went in there and Mr. Kennedy asked me to sign this as his witness and told me what it was?

"*Q.* That he was making a will and wanted you to sign as a witness, or Mr. Black in his presence and you did sign as a witness to his making his will; what do you say as to whether any such transaction as that occurred?

"*A.* Well, from memory I would say, 'No.'"

The court directed a verdict for the proponents, instructing them that the will had been executed in pursuance of the formal requirements of the statute and that parol testimony that the testator did not intend that the instrument should operate as a will was not receivable.

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"The presumption is that this paper was executed, subscribed and attested or witnessed as it purports to be on its face, and the mere fact that Mr. Black, one of the witnesses, fails to remember the circumstances under which he subscribed and attested this will, cannot under the law of this State be allowed to defeat it.

"The court instructs you that these statutory formalities of execution have been complied with in this case as shown by the evidence. That is, the paper claimed to be a will is in writing, it is signed by Mr. Thomas Kennedy, it was attested and subscribed in the presence of the testator by two or more competent witnesses, hence you must assume that the paper here claimed to be a will, was executed in the form and manner as prescribed by law.

"The contestant also claims as heretofore stated, that Mr. Kennedy at the time he executed this paper did not intend to make a will, but signed the paper merely to satisfy his relatives, the family of John Cavanaugh, Mr. Cavanaugh being the beneficiary under the will, and this being the family with whom Mr. Kennedy was living. Mr. John L. Black testifies that Mr. Kennedy said to him just before the paper was prepared, signed and witnessed, that he, Mr. Kennedy, did not intend the paper for a will, but merely to satisfy the sons of John Cavanaugh who were hounding him about his property. The court says to you that this testimony cannot be received and considered to invalidate the paper and render it of no effect as a will. Parol testimony of this kind when it arises, separate and apart from any question of fraud, undue influence, mental competency or of ambiguity in the paper proposed as a will, cannot be permitted to overcome the presumption that the testator in executing a solemn instrument like a will, intended the paper not for a will but to serve some collateral and extraneous purpose. To admit such testimony to defeat a will in a case like this would to some extent tend to defeat the right which every sane and competent person has under our laws to make a final disposition of his property by will and to have his or her wishes in regard to property carried out after death. The momentous consequence of permitting parol evidence to thus outweigh the sanction of a solemn act is obvious. It would have a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said and what he put in solemn written form. Hence, gentlemen of the jury, it is the duty of the court in this case to direct a verdict in favor of the proponent of the will."

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The will gave all of his personal property to his sister's husband, John Cavanaugh. The important question presented by this record is, whether the court erred in holding, as a matter of law, that evidence was not admissible to show that the alleged will was executed for a collateral purpose and that the testator did not intend it to operate as a will disposing of his property. Stated in another way, the question is: Is an instrument purporting to be a will and executed with all the statutory formalities conclusively presumed to have been executed *animo testandi*? This question is one of first impression in this court. As stated by the circuit judge, the question is wholly separate and apart from any question of fraud, undue influence, or mental competency in the procurement of the will or of ambiguity in the meaning of its provisions. The evidence conclusively shows that the testator was of sound mind, was laboring under no mistake of fact, knew precisely what he was doing, and intended to do precisely what he did do, viz.: to execute, according to the forms prescribed, a paper on its face disposing of his estate, with knowledge that he could revoke it at any time. Accepting the testimony of the scrivener, it must be presumed that he exhibited the will to his brother-in-law as his genuine will for the purpose of securing peace in the family and securing those attentions which he required.

"*Q.* You understood from him that he was making his home at the Cavanaughs'?

"*A.* I did; yes. Mrs. John Cavanaugh was his sister.

"*Q.* What reason did he give for making his home there?

"*A.* If I remember right, that his father and brothers were keeping bachelor's hall or something of that kind and it was handy for him over there; that he could get his clothes cared for and one thing and another with his sister, and he made his home there and lived with them. I don't know how long he had been living there, but if I remember right, he told me that he taught school out in Emmett, too, and had made his home there while he was teaching school. Then he came in here and remained a great many years when he was here as deputy county

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treasurer. He made his home then at Mr. Walsh's hotel. He had either left the county treasurer's office or was about going to leave, I don't remember just which, and he was going back to make his home with the Cavanaughs or had made it when this trouble arose out there whatever it was, he wouldn't tell me the details of it.

"*Q.* So that just before this will had been made he was here to town for eight years?

"*A.* For eight to twelve, somewhere along there."

The testimony of the scrivener also discloses that Mr. Kennedy intended at a future time to make a will, but never spoke to him again about the paper in question or the making of another will. For over 11 years Mr. Kennedy retained this will in his possession, so far as this record discloses, and died leaving it unrevoked. There can be no doubt that a presumption of testamentary intention arises from the deliberate execution, by a competent person, of a paper in the express form of a will in strict pursuance of the provisions of our statute regulating the execution of wills. Whether this presumption is a disputable one is the serious question in this case.

Respectable authorities are cited by counsel for contestants, some of which are directly in point, holding that parol evidence is receivable in such cases. The case of *Lister* v. *Smith*, 3 S. & T. 282, is such a case. In that case, the question was whether a certain codicil was entitled to probate. It was regularly executed by the testator, but evidence was given at the trial that the testator never intended it seriously to operate as a testamentary document. It was proved before the jury that the testator wished one of the family to give up a house which she then occupied and that, to force her to do so, he made pretense of revoking by codicil a bequest which he had made by will in favor of this woman's daughter, and that the paper in question was made with that sole object; that the testator gave his attorney instructions to prepare it with that intention and informed him before it was drawn that he never wished it to operate at all; further, that the attorney pointed out the folly of executing such an in-

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strument and would have nothing to do with its execution. It was, however, executed in the presence of the testator's brother, to whom it was then given by the testator with express directions that he was not to part with it and that it was in no event to operate or to revoke the bequest made in his will, but to be used only in the manner above described. Similar declarations were made by the testator at the moment of its execution. The court said:

"The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said. On the other hand, if the fact is plainly and conclusively made out, that the paper which appears to be the record of a testamentary act, was in reality the offspring of a jest, or the result of a contrivance to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the court should turn it into an effective instrument. And such no doubt is the law. There must be the *animus testandi*;" citing *Nichols* v. *Nichols*, 2 Phille. 180; *Trevelyan* v. *Trevelyan*, 1 Phille. 149; Swinb. pt. 1, s. 3; Shep. Touch. 404; *Pym* v. *Campbell*, 6 El. & Bl. 370.

The court, however, recognizing the serious consequences which might flow from this holding, remarked:

"But here I must remark that the court ought not, I think, to permit the fact to be taken as established, unless the evidence is very cogent and conclusive. It is a misfortune attending the determination of fact by a jury, that their verdict recognizes and expresses no degree of clearness in proof. They are sworn to find one way or the other, and they do so sometimes on proof amounting almost to demonstration, at others on a mere balance of testimony; sometimes upon written admissions and independent facts proved by disinterested parties, sometimes on conflicting oaths or a nice preponderance of credibility. And it is difficult to impress them with the enormous weight which attaches to the document itself as evidence of the *animus* with which it was made. This weight it becomes the court to appreciate, and to guard with jealousy the sanction of a solemn act. In the present case, however, the court finds the evidence so cogent, that it is

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prepared to act on the finding of the jury that the codicil was executed as a sham and a pretense, never seriously intended as a paper of testamentary operation. But I am far from saying that the court will in all cases repudiate a testamentary paper simply because a jury can be induced to find that it was not intended to operate as such. The character and nature of the evidence must be considered, as well as the result at which a jury have arrived, and the court must be satisfied that it is sufficiently cogent to its end."

The case of *Swett* v. *Boardman*, 1 Mass. 262 (2 Am. Dec. 16), cited by counsel for contestants, is to the effect that some form of publication of a will is necessary, and that it was competent to prove by parol that at the time of executing the instrument proposed as his last will and testament the testator did not know or suppose that he was executing a will. The case of *Waite* v. *Frisbie*, 45 Minn. 361 (47 N. W. 1069), also cited by counsel for contestants, merely holds that where a will is not read by nor to the testator and it has been prepared by another person from instructions given by the testator and is then signed upon an assurance that it expresses what he desires, if the language inserted is not the language of the instructions, and if it does not make in legal effect the provisions which the testator apparently desires, it is not his will.

See, also, 30 Am. & Eng. Enc. Law (2d Ed.), p. 581, and cases cited; 1 Underhill on Wills, § 39.

"The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act," referred to by the court in the case of *Lister* v. *Smith*, *supra*, are still more momentous under the laws of this State, since, under the rule of evidence prevailing with us, no more cogent evidence is required to establish the fact of lack of testamentary intention in the making of an instrument than to establish any other fact which may be submitted to a jury for its determination, and the court has no greater authority to control the verdict or influence it in such a case than in any other. Recognizing fully the high character of the authorities sustaining the con-

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testants' position, we are inclined, as this is an open question in this State, in view of the serious consequences of the contrary view, to hold, as was held by the supreme court of Alabama in the case of *Barnewall* v. *Murrell*, 108 Ala. 366 (18 South. 831), that:

"It was, doubtless, one of the purposes of the statute, in requiring that testamentary dispositions of personal property should be executed with the same formalities required in devises of land, to remove them from the doubt and uncertainty in this respect which attended them while the rule of the common law prevailed. There is no other mode of giving a valid expression to the *animus testandi*, than that which the statute prescribes. Whatever forms the expression may assume, whatever solemnity may accompany it, the statute declares it ineffectual, unless the formalities it prescribes are observed. When these formalities are observed, if the writing be testamentary, if it imports a posthumous destination of property, the statute in itself and of itself attaches, and conclusively attaches, the *animus testandi*. The requisition of extrinsic or additional evidence of its existence is to add to the requirements of the statute; and to receive such evidence to repel the existence of the intent would be to receive evidence against the statute."

And, again:

"When a sane testator, not subject to coercion or restraint, intentionally executes, with the formalities required by the statute, a writing which in form and substance is testamentary, the writing of itself imports, and conclusively imports, the *animus testandi*, *i. e.*, the mind to dispose, the firm and advised determination to make a testament, closing all inquiry as to the existence and manifestation of the intent."

Section 9262, 3 Comp. Laws, provides for the disposition of real property by will. Section 9265, 3 Comp. Laws, provides that every person of full age and sound mind may by his last will and testament in writing bequeath and dispose of all his personal estate. Section 9266, 3 Comp. Laws, provides that no will—

"Shall be effectual to pass any estate, whether real or

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personal, nor to charge or in any way affect the same, unless it be in writing, and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses;" etc.

Section 9270 provides:

"No will nor any part thereof shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil in writing, executed as prescribed in this chapter; or by some other writing, signed, attested and subscribed in the manner provided in this chapter for the execution of a will; excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator."

No publication of the instrument is required in this State to give it effect, but the execution of an instrument in testamentary form with the statutory formalities completes the testamentary act. *Danley* v. *Jefferson*, 150 Mich. 590 (114 N. W. 470).

The execution of a paper in the form of a will under the provisions of our statute does not place the instrument beyond the control of the testator, whether he retains possession of it himself or delivers it over to the persons for whose benefit it has been made or to another person for them. It remains at all times subject to his control. If he retains possession of it, he may revoke it in one of the ways specified in the statute. If he has parted with the possession of the instrument, he may revoke it by making a will. The certificate of attestation is as follows:

"On this 11th day of February in the year one thousand eight hundred and ninety-seven, Thomas Kennedy of the township of Emmet, St. Clair county, Michigan, signed the foregoing instrument and declared the same to be his last will and testament in the presence of us as witnesses and we not being interested therein at the request of said Thomas Kennedy, in his presence and the presence of each other, and where he could see us sign our names,

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did thereupon on said above mentioned day, subscribe our names thereto as witnesses thereto.

"CLARE R. BLACK,
"Residing at Port Huron, Mich.
"JOHN L. BLACK,
"Residing at Port Huron, Mich."

On the back of it, in the handwriting of Mr. Black, was: "Will of Thomas Kennedy, of Emmett, St. Clair county, Michigan." It is undisputed that John L. Black witnessed the instrument in the presence of the testator. Clare R. Black testified:

"*Q.* Do you recall the circumstance of signing that?
"*A.* No, sir.
"*Q.* You haven't any present memory of going into that office? You haven't any present memory of signing that paper at all?
"*A.* No, sir. * * *
"*Q.* But you have no memory one way or the other on this paper now at this time?
"*A.* No, sir."

It is apparent from his testimony that he had no recollection whatever of the facts connected with his signing the will as a witness. His opinion, based wholly upon conjecture, is not sufficient to raise a question of fact for the jury, and the trial court did not err in so holding. *Abbott* v. *Abbott*, 41 Mich. 542 (2 N. W. 810). The declarations of the testator that he was being hounded to make a will are the sole evidence in the record of undue influence in the procuring of the will, of which fact they are not competent evidence. *Zibble* v. *Zibble*, 131 Mich. 655 (92 N. W. 348).

The judgment is affirmed.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

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DE BOER *v.* ADAMS.

1. MALICIOUS PROSECUTION — QUESTIONS OF LAW AND FACT—ADVICE OF PROSECUTING ATTORNEY—STATEMENT TO ATTORNEY — PROBABLE CAUSE.

   In an action for malicious prosecution the defense that probable cause was shown and that the facts were fully and fairly stated to the prosecuting attorney, who directed the commencement of the proceeding, is a question of fact, where it appears that the plaintiff was arrested for the malicious destruction of trees growing along the highway which the evidence tended to show were a nuisance and were cut by the plaintiff under the direction of the overseer of highways, and it further appeared that the defendant stated the facts within his knowledge to the prosecuting attorney who directed the issuance of a warrant, but that the defendant omitted to state to the prosecutor that the growth had been previously cut by the public authorities, or that he was informed that the authorities intended to cut them again.

2. HIGHWAYS AND STREETS—TREES—RIGHTS OF ABUTTING OWNER —STATUTES.

   Section 4163, 2 Comp. Laws, requiring notice to be given to the adjoining owner before trees in the highway are cut, in order to give him an opportunity to remove them, only applies to trees growing upon the margin of the highway.

3. SAME—EVIDENCE OF AUTHORITY TO CUT TREES IN HIGHWAY.

   A refusal of the plaintiff to state his authority for cutting the trees and undergrowth in the highway does not operate as an admission that he had no authority to act.

Error to Kent; Perkins, J. Submitted November 19, 1909. (Docket No. 81.) Decided February 3, 1910.

Case by Anthony De Boer against William F. Adams for malicious prosecution. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

J. T. Preston, for appellant.

Dunham & Dunham, for appellee.

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BLAIR, J. This is an action on the case to recover damages for the alleged malicious prosecution of the plaintiff under the provisions of 3 Comp. Laws, § 11585, for the wilful, malicious, and wanton destruction of certain trees in a certain highway in the township of Paris, in the county of Kent.

Plaintiff gave evidence tending to show that he had been employed by his father, who at the time was the overseer of highways, to cut down the trees in question, receiving the wood that he could get out of them for his pay. The evidence also tended to show that the highway commissioner had instructed the overseer of highways to cut out the trees. The defendant Adams' farm abutted upon the highway in question, and the south half of the highway had originally belonged to him, but was condemned by the public authorities and compensation awarded and paid to Adams for his land. The road was laid out on the section line, where originally defendant's line fence stood, and the trees had grown up along this line fence. Plaintiff's testimony also tended to show that at the time the road was opened, about 1888, the trees and brush were mostly cut off, but sprang up again from the stumps and roots, and were again cut off about 10 or 11 years before plaintiff cut them, as hereinafter stated. Plaintiff's testimony also tended to show that the so-called trees were, for the most part, third growth saplings and brush, that they extended, in the widest part, about 10 feet on each side of the middle line of the highway, and were a nuisance, particularly in the winter time, owing to the drifting of the snow and its banking up against them. It also appeared that under his alleged agreement plaintiff was to cut no wood on the outside, or margin, of the road, but only in the center, and he testified that he did not. It also appeared that Mr. Adams had lived adjoining this highway ever since it was opened.

Plaintiff's testimony with reference to the arrest, upon which this action is predicated, is as follows:

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"Mr. Adams came up and said, 'Do you know whose shade trees you are cutting?' I said, 'I did not know as I was cutting shade trees.' He said: 'You are; you are cutting my shade trees, and I want you to go.' I said, 'I didn't know that I was cutting shade trees.' He said, 'What do you call them?' I said, 'I call that brush.' Then he wanted to know who I was, and I told him I thought 'that was for me to know and for him to find out.' Then he said he would go down and have me arrested for cutting shade trees—his shade trees—and being saucy to him. * * * That was all the talk with Mr. Adams at that time. Later Mr. Adams came back with a neighbor by the name of Smith, and he said that 'he had brought his neighbor to see what I was doing.' I said, 'Well, he looks as though he has got good eyes, and he ought to be able to see what I am doing.' That was all that was said, I guess."

One Charles Gouzewaard testified that, in the morning of the day of plaintiff's arrest, and before Mr. Adams saw the prosecuting attorney, he told Mr. Adams that John De Boer, plaintiff's father and the overseer of highways, had told his (Gouzewaard's) father to cut the grubs, and he did not want to cut them.

Defendant's version of the transaction leading up to the arrest was as follows:

"When I first saw De Boer cutting the trees, it was on the 9th of January. I went to him and asked him how he happened to be cutting those trees, and he said, 'I want them for wood.' 'Well,' I said, 'you are trespassing. Those trees are on my land. They are this side of the center of the road.' He said, 'The trees belong to anybody that is a mind to cut them.' I asked him his name, and he said, 'It was for me to find out.' I asked him 'if he had any authority to cut those trees,' and he said 'that was his business.' I forbid his cutting any more. * * * Then I came to town and went to the prosecuting attorney's office and said to McDonald, 'McDonald, I have a grievance,' and he asked me what it was, and I defined the situation. I asked him for a warrant. I told him we had a lot of trees cut there. I told him we had a line of trees cut there numbering about 150 that occupied a space in the center of the highway, and I asked for a warrant. That was about all I said to McDonald. That covers the

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whole ground, and he called up Mr. Lindsey. I told him I found this man cutting trees. I told him the man was John Doe. He would not tell me his name, and I told McDonald he said, 'That was for me to find out.' I told him I found this man cutting the trees, and I asked him his name and he said, 'Find out,' and then I told McDonald that I asked him if he had any authority from anybody to cut these trees, and he said 'that was his business.' I told him where those trees were, the size of some of them. Then Mr. McDonald called Mr. Lindsey and introduced me to him. He said, 'Mr. Lindsey, give Mr. Adams a warrant.'"

Upon direction of the prosecuting attorney, the proceedings before the magistrate were dismissed without the taking of any testimony. After the proofs had been put in in the circuit court in the present case, the trial judge directed a verdict in favor of the defendant on the ground that the undisputed facts showed that the defendant had probable cause for instituting the criminal prosecution, and that he was protected by the action of the prosecuting attorney in taking charge of the case.

We think the trial judge erred in directing a verdict. In our opinion the question whether he had made a full and fair disclosure of everything within his knowledge which would tend to cause or to exclude belief in plaintiff's guilt was a question of fact for the jury and not for the court. *Lansky* v. *Prettyman*, 140 Mich. 40 (103 N. W. 538).

We are also of the opinion that the question whether defendant had probable cause for making the complaint was a question of fact for the jury. While the conduct of the plaintiff was not commendable, we do not think it alone justified the defendant, as a matter of law, in causing his arrest without further inquiry. The plaintiff's statement of what occurred differs in some respects from the defendant's statement, and if the jury believed his statement and found that those grubs in the middle of the road had twice before been cut down by the public authorities, and that defendant must have known of such cut-

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ting, and that Gouzewaard informed him that the overseer of highways had endeavored to induce his father to cut out these same grubs, and that, for the most part, the grubs were third growth from the original stumps and constituted a nuisance in the highway, these facts, with the other circumstances disclosed by the record, would require the submission of the question of probable cause to the jury.

We are further of the opinion that the law requiring notice to be given to the adjoining owner before trees are cut, in order to give him an opportunity to remove them, only applies to trees growing upon the margin of the highway. See 2 Comp. Laws, § 4163. And we are of the opinion that it was not contemplated that a strip of brush, grubs, and trees should be left standing and growing in the middle of a country highway, and that such growth is *prima facie* evidence of obstruction of the highway. While the grubs after being cut, so far as they were of any value, belonged to the defendant, the highway officers were under no obligation to give him notice to remove them before cutting them down.

It cannot be found, as a matter of law, that plaintiff admitted that he had no authority to cut the grubs, but the inference is at least permissible that he neither affirmed nor negatived his authority, but left it for the defendant to ascertain from further investigation.

The judgment is reversed, and a new trial ordered.

HOOKER, MOORE, MCALVAY, and BROOKE, JJ., concurred.

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BROWN & BROWN COAL CO. v. GRAND TRUNK RAILWAY SYSTEM.

CARRIERS—DISCRIMINATION—MANDAMUS—RAILROADS.

The refusal of a railway company to extend credit for freight charges to a shipper with whom it had had previous difficulty does not constitute an unreasonable disadvantage or prejudice under Act No. 312, Pub. Acts 1907, and does not entitle the shipper to the writ of mandamus.

Certiorari to Wayne; Donovan, J. Submitted November 16, 1909. (Calendar No. 23,211.) Decided February 3, 1910.

Mandamus by the Brown & Brown Coal Company to compel the Grand Trunk Railway System to forward certain freight without the prepayment of charges. An order denying the writ is reviewed by relator on writ of certiorari. Affirmed.

E. T. Berger, for relator.

L. C. Stanley, for respondent.

BLAIR, J. On or about October 22, 1908, the defendant railroad company delivered to the siding of the relator eight cars of sand, upon all of which cars certain freight charges were due and payable at the time of delivery. On the same day as delivery, the relator directed the railroad company to deliver three of said cars to the Fairview Coal & Supply Company of Detroit, with freight charges to follow, and deliver five of said cars to the People's Ice Company of Detroit, with charges to follow. In directing charges to follow it was understood that same were collectible from the parties to whom the cars were directed to be forwarded. It is admitted by the railroad company that cars were so delivered and orders were received for

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forwarding as above stated. The defendant railroad company refused to forward the cars until the charges thereon had been paid by the relator, and refused to undertake to move the cars to, and collect the charges thereon from, the parties to whom they were directed to be forwarded. On October 28, 1908, a car loaded with gravel was delivered to the relator's siding, and on the same day it directed the railroad company to deliver same to Schillinger Brothers of Detroit, with freight charges to follow. The railroad company refused to move the car until the charges were paid by the relator. The relator claims in this case that it had, until the month of August, 1908, been doing business with the railroad company under its usual custom of forwarding cars to its purchasers with all charges to follow, and that this custom had been in full force and effect ever since it was in the sand and gravel business, and that because of a dispute with the railroad company over car measurements in another and different matter the railroad company, as a retaliatory measure, refused to move the cars in question in this case until the relator had advanced freight charges thereon. The relator further claims that other dealers in sand and gravel in the city of Detroit doing business with the defendant railroad company are accorded the privilege of forwarding materials in car lots to their customers with freight charges to follow and paid by the parties to whom they were to be forwarded. The relator claims that this is the way they do business, and the terms upon which the materials are sold include the payment by the purchaser of the freight charges, and that by reason of the arbitrary action of the defendant railroad company in suddenly refusing to continue its custom the relator company was put to a serious disadvantage with its competitors.

Jacob G. Brown, relator's assistant manager, testified:

"The Grand Trunk System maintains what is known as a 'credit list,' which is an accommodation extended to different concerns for their convenience, giving them the privilege of ordering their shipments to different yards,

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etc. When the cars are delivered, the bills are sent and they are paid. It is conducted just like a general book account. Our request was, of course, on the condition that those consignees were upon the credit list of the Grand Trunk. If the parties to whom we directed shipment were not on their credit list, we were willing to prepay the freight. We have done this before. Some time in the spring last year we had a disagreement with the Grand Trunk Railway Company with reference to charges. We disputed their measurements of certain cars upon which the charges are based. The discrepancies were so great that we refused to pay the charges, and asked them to correct the bill, and they refused to do that. There were some 88 bills unpaid for that reason, and that resulted in their canceling our credit and at the same time refuse to move any cars. The dispute was finally settled, but our credit was not restored, although they stated that their reason was not because of any lack of financial standing. Prior to this dispute we had forwarded cars over the Grand Trunk with charges to follow without objection.

"*Q.* After this dispute and the settlement of it, did they consent to move cars and have charges to follow?

"*A.* No; they have refused to do so. The matter of reconsignment of cars with charges to follow has never been in dispute before; the previous trouble being for the reason stated. We have competitors along the line of the Grand Trunk Railway. We have purchased material from other concerns along the Grand Trunk last year and have ourselves paid the charges on the reconsignment of these cars to us without objection by the railroad company prior to our dispute with them. Our purpose in not prepaying charges and to have them follow the cars to their final buyer is because our sand is sold on pit measurement or railroad measurement, and the customers when they settle for the shipment want to see the freight bills before paying to see if they correspond with the pit measurement. We are always responsible for the freight until it is paid by the reconsignee, but there are about 16 cars that we ordered forwarded that were not delivered, all of them being rejected by the railroad company. Because of the failure of the railroad company to move cars on our order the orders were canceled."

Respondent's local freight agent testified:

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"There were 22 cars that were held up in the latter part of August, or the first part of September, caused by our canceling their credit on account of their delay in settling charges on previous cars. These charges had remained undisposed of for some days. Finally, they paid our charges as rendered except on three cars, making a difference in the charges of about $1. Those cars were standing there all the time until they paid, so that they had opportunities to remeasure them. As far as my knowledge goes, I have had more trouble with them than with any other firm in settling charges. There was $600 of freight money outstanding and in dispute in October."

Relator prays for the writ of mandamus commanding the respondent to move the cars refused and all cars in the future, with charges to follow, so long as such privilege is extended to relator's competitors. Relator relies upon the custom shown as bringing it within the rule of *Gates* v. *Railway Co.*, 151 Mich. 548 (115 N. W. 420), and upon section 17, Act No. 312, Pub. Acts 1907. In the *Gates Case* the contract between the parties was alleged to have been made with reference to the custom then existing between the parties to deliver complainant's logs on defendant's side track in Bay City for transportation to complainant's mill on the Michigan Central. The circuit judge granted the preliminary injunction prayed for, commanding the defendant to deliver cars at the customary place until the further order of the court. Defendant appealed, and, in view of the custom, the temporary inconvenience to defendant and the serious injury to complainant of a contrary holding, this court, for the purpose of maintaining the *status quo* until the final hearing, sustained the trial court.

In the present case the alleged custom, so far as relator was concerned, had only existed from May, 1907, to August, 1908. It did not apply as to all dealers, but only to those who were placed by defendant upon its credit list, and such place did not depend upon contract or other legal right but upon the grace of the defendant. At least, the defendant was entitled to determine for itself to

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whom it would extend credit, and, having had serious trouble with relator in collecting its freight charges, we cannot say that it was not justified in striking its name from its credit list. The case is clearly distinguishable from *Gates* v. *Railway Co.*, *supra*. Section 17, Act No. 312, Pub. Acts 1907, provides that: "It shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation," etc., or subject them "to any undue or unreasonable disadvantage or prejudice in any respect whatsoever." We do not think that the acts complained of give an *undue* or *unreasonable* preference or advantage to relator's competitors or subject relator to an *undue* or *unreasonable* disadvantage or prejudice within the meaning of said section 17. 2 Hutchinson on Carriers (3d Ed.), §§ 567, 799, and cases cited in notes; *Little Rock, etc., R. Co.* v. *St. Louis, etc., R. Co.*, 63 Fed. 775, 11 C. C. A. 417 (26 L. R. A. 192); *Randall* v. *Railroad Co.*, 108 N. C. 612 (13 S. E. 137).

The order of the circuit court is affirmed, and the writ is dismissed.

MONTGOMERY, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

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McCAUSEY *v.* HOEK.

1. EXEMPTIONS—EXECUTION—LEVY—DEBTOR AND CREDITOR.
   The selection of their statutory exemptions by merchants who gave a trust mortgage for the benefit of creditors is not conclusive upon a judgment creditor who did not accept rights under the trust, and he is entitled to attack the amount of such selection by an execution levy upon the property in the hands of an assignee who paid no consideration.

2. SAME—DUTY TO CLAIM—EXECUTIONS.
   Where the assignee of such exempt stock, under a transfer without consideration, does not claim it as exemptions sold to her, the officer who makes a levy is not bound to set them off.

3. EXECUTIONS — LEVY ON PROPERTY OF STRANGER — EFFECT OF MIXING PROPERTY.
   No action lies in favor of a stranger to the writ of execution against the officer making a levy upon property subject thereto and other intermingled property of such stranger who refuses to select the goods which belong to her.

4. SAME—DUTY OF OFFICER.
   The officer is required to make the selection if he can.

5. DAMAGES — TROVER AND CONVERSION—LEVY OF EXECUTION ON PROPERTY OF STRANGER.
   The damages sustained by a third person from the wrongful levy of an execution are the value of the property converted plus the amount of depreciation of the goods.

6. SAME—TORTS—TRESPASS ON THE CASE.
   A trespasser who interrupts a merchant's business is liable for the injury to the business.

7. SAME.
   The cost of repurchase of the goods is not the full measure of damages where a merchant is deprived of his entire stock; and he may recover for profits lost as measured by previous gains, and for losses sustained in performing contracts from which he would otherwise have profited.

8. SAME—DUTY TO MITIGATE.
   The damages so recoverable in an action of tort are subject to the duty to mitigate them by the purchase of other goods.

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Error to superior court of Grand Rapids; Stuart, J. Submitted November 17, 1909. (Docket No. 114.) Decided February 3, 1910.

Trespass on the case by Lena B. McCausey against George Hoek. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

Kleinhans & Knappen, for appellant.

Charles A. Watt (*Charles V. Hilding*, of counsel), for appellee.

HOOKER, J. The declaration in this cause is "trespass on the case," charging an unlawful seizure of a stock of goods and conversion of the same to defendant's use. In addition to the value of the goods converted, it claims damages for the interruption of the plaintiff's business and loss of profits. Plaintiff recovered a verdict and judgment of nearly $900, and the defendant appealed.

The plaintiff was conducting a store. She had three classes of goods therein: (1) Some millinery goods given to her by her husband; (2) some furnishing goods that she received from one Sprague; (3) some goods of both kinds purchased by her. The defendant was a constable. He levied on these goods on the 3d day of April, 1907, under an execution issued in a judgment against McCausey and Sprague, claiming the property to be theirs. At the time of the levy and inventory plaintiff claimed the goods to be hers, and the defendant surrendered to her all that she pointed out was hers. This appears to have included only some goods from class 3. The goods retained by the officer were at once removed from the store, and soon afterwards plaintiff's attorney made a formal demand upon defendant for all of the goods taken, claiming them to be the property of the plaintiff. Defendant offered to return to the plaintiff all goods that she would select as her own. She refused to make such selection, or to furnish invoices so that the defendant might do it.

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Thereafter the defendant sold the goods at execution sale, and they were bid in by one Post at $75 or $85, and the plaintiff immediately took them from him, paying him the exact amount of his bid. This was about six weeks after the levy. The defendant maintains that classes 1 and 2 were subject to levy at the suit of creditors of McCausey and Sprague, former copartners, who were out of business at the time of the levy. He also claims that such portions of the goods in class 3 as he retained had been so mixed with those in the other classes as to make them indistinguishable, and that he was therefore justified in taking them, subject to plaintiff's right of selection, which he was willing and offered to respect.

These goods were acquired by the plaintiff in the following manner: Her husband and Sprague engaged in the business of selling millinery and furnishing goods; plaintiff assisting in the millinery department. Becoming involved, they gave to the firm of Corl, Knott & Co., a creditor, a trust mortgage of all of their property, except their lawful exemptions, in trust for creditors. Corl, Knott & Co. closed out the stock, after allowing McCausey to select certain goods as exemptions for himself and Sprague. This occurred about March 8, 1907. The creditors were not paid in full, and McCausey and Sprague were insolvent. These so-called exemptions went into the possession of plaintiff, class 1 by gift from McCausey, and class 2 under an oral arrangement that if Sprague did not succeed in selling them, plaintiff should put them with her stock and sell them, accounting to Sprague for the proceeds. He did not sell them, and she put them on the shelves for sale. She also bought some goods of both kinds to replenish stock, and these were placed on the shelves also. These constituted the goods in class 3.

At the time that McCausey and Sprague went out of business, they had a right, as against their creditors, to exemptions, but the creditors could not be bound by their selection; *i. e.*, as to amount and value. Each was entitled to select from the stock goods amounting in value

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to $250, and no more, and we see no reason for saying that the judgment creditors in this case were bound to admit such selection to have been a valid one, even if the mortgagee did acquiesce. They did not attack the voluntary trust mortgage, and it is not shown that they accepted a dividend from the trustee; but, if they did, this did not deprive them of the right to enforce their judgment against any of the property of the judgment debtors. And such property, in the hands of an assignee who paid no consideration, was subject to the levy, with the right to have exemptions set off if entitled to them and demanded. See *Ostrander* v. *Packer*, 35 Mich. 430.

They levied their execution upon property supposed to belong to the judgment debtors, and proceeded to make an inventory. At that time the judgment debtors were out of the mercantile business; one had gone away, and the other had engaged in other business. The record does not show that the officer had any reason to suppose that they were claiming this property as a selected exemption, or that they were engaged in a business making it exempt. Yet he proceeded to inventory it. Then the plaintiff claimed the property as her own. She did not claim it as exempt property sold to her. Upon this record the officer owed her no duty as to setting off exemptions, as she claimed none. Had she done so, the levy would not have been unlawful, for the judgment creditor had a right to levy and set off exemptions. By an *ex parte* selection of an amount for exemptions those parties did not conclude the defendants. The assignee succeeded to McCausey's rights to exemption, but it was necessary for her to assert them. *Williams* v. *Brown*, 137 Mich. 569 (100 N. W. 786). Not having done so, she has waived her right to the goods in class 1. The same may be said of the goods in class 2, and, further, she makes no claims to recovery of those goods, as shown by her counsel's brief. They may therefore be considered as out of the case.

Having found that the defendant lawfully seized and sold the goods in classes 1 and 2, it leaves only those in

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class 3 to be considered. Those goods were not subject to this execution, and it is only upon the theory of admixture of goods, and a refusal by her to designate them, which no other person could do, that the defendant can escape liability. The proof conclusively shows that she was offered the opportunity of selecting and taking any and all goods that she should claim to be hers. The offer was broad enough to cover goods in any class. She refused; her language implying that she preferred another method of getting her rights. We recognize the injustice of compelling any one to lose their goods through admixture, where it can be avoided. We have no doubt that the intermixture was made in perfect good faith, but the refusal to point out the goods purchased by her, other than to say she claimed them all, was not treating the officer fairly, and it was equivalent to an intentional admixture of her own with goods clearly subject to levy. The officer had the alternative of releasing all the goods or selling all. If he released goods subject to levy and sale, he became liable to the execution creditor. We think, therefore, that he was justified in making the sale.

Counsel for defendant cite many authorities sustaining the propriety of seizing admixed goods, including some subject, and others not subject, to execution. In such a case it is undoubtedly his duty to separate them if possible. In *Daumiel* v. *Gorham*, 6 Cal. 44, the court said:

"Where the goods of a third person are mixed with the property, or in the apparent possession of the judgment debtor, a sheriff who levies upon them, supposing them to belong to the defendant in execution, is not liable as a trespasser *ab initio*. In order to charge him it is necessary to show a notice and demand of the goods, and a delay or refusal to deliver."

In *Taylor* v. *Jones*, 42 N. H. 25, 33, we find it stated that:

"If the plaintiff's goods were intermingled with those of Rand through his own fault, he had neither the possession, nor right of possession, of the goods as against a creditor

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or an officer having process against Rand, and attaching the whole intermixture as the property of Rand, and therefore could not maintain trespass for taking them."

It was said in *Lewis* v. *Whittimore*, 5 N. H. 364–366 (22 Am. Dec. 466):

"The direction which was given to the jury in this case in relation to the corn was correct. It is immaterial whether the corn had been mixed with the plaintiff's assent or not. It was all in the possession of the plaintiff's agent, Haywood, and, while in Haywood's possession, had been intermixed. Haywood at first told the officer that the corn belonged entirely to the plaintiff; and, although he afterwards informed the officer that only a part of the corn belonged to the plaintiff, it does not appear that he stated what portion was the property of the plaintiff. It was the duty of the officer to attach the goods of the debtor, notwithstanding they were intermixed with the goods of the plaintiff; and he had a right to take and hold the whole until the plaintiff identified his goods, and demanded a redelivery. *Shumway* v. *Rutter*, 8 Pick. (Mass.) 443 (19 Am. Dec. 340); *Bond* v. *Ward*, 7 Mass. 127 (5 Am. Dec. 28); 2 Blackstone's Commentaries, p. 405; *Pettingill* v. *Bartlett*, 1 N. H. 87; Cooper's Justinian, Lib. 2 F. 1, §§ 17, 18. The sheriff cannot be treated as a trespasser for doing what he had a right to do. If the plaintiff gave the officer notice of what interest he had in the corn, and demanded a return, trover may be maintained. If the officer has sold the whole, after notice of the plaintiff's claim, that may be a conversion. But trespass does not lie for the original taking."

"It is, at all events, the business of the owner who, wilfully or carelessly, has allowed his goods to become confused with those of a debtor to point out to the officer what belongs to him; and since his own duty is to attach the debtor's goods, whether so mingled or not, the officer is no trespasser merely for having attached, in good faith and with due care, those of another blended in the same mass." 2 Schouler on Personal Property (3d Ed.), § 50.

In *Smokey* v. *Peters-Calhoun Co.*, 66 Miss. 471, 475 (5 South. 632, 14 Am. St. Rep. 575), it was said:

"The goods claimed by appellant having been levied on under the writ of attachment, as part of a stock of goods

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intermixed with those of the defendant in the attachment, and appellant having claimed the whole of the stock, instead of pointing out and giving notice to the sheriff of what particular part of it belonged to him, he is not entitled to recover damages for his part of the goooods having been seized and held by the sheriff, until they were, for the first time, designated as belonging to him, on the trial of the claimant's issue. It was the duty of the sheriff to levy on the goods of the defendant in attachment, notwithstanding they were intermixed with those of appellant, and he had a right, and it was his duty, to take and keep the whole, until appellant identified his part of the stock, and demanded that it should be delivered to him. The sheriff cannot be treated as a trespasser for doing what he had a right to do."

The following excerpts from cases are in point: *Orr Shoe Co.* v. *Frankenthal*, 4 Ind. T. 375 (69 S. W. 908):

"If the plaintiffs' agent were claiming the whole of the stock of goods, and as such agent, on the part of plaintiffs, he had a bill of sale of only part of said stock, this would be such a fraud upon the officer that there could be no liability whatever in his seizure, under his attachment writ, of the whole of the stock of goods. And if this contention was maintained after the service of the writ, and were all of the goods in the possession of the officer, it would still be a fraud upon such officer, and there would be no liability."

Helfrich v. *Stem*, 17 Pa. 153:

"If, at the time of the levy, it was known to the vendee that the goods were taken as the property of the vendor, and as a means of avoiding the sale, and the vendee gave only a general notice of his claim, such notice will be construed to mean no more than a denial of the fraud in the sale; and it would be unjust and unlawful to allow him, on such notice, to make the sheriff a trespasser, by proof that since the sale to him, he had made additions to the store out of his own means, and confounded them with the goods fraudulently transferred to him."

Wellington v. *Sedgwick*, 12 Cal. 476:

"It seems that these goods so sold were mixed with other goods subsequently bought by Wellington; and the

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sheriff, by virtue of the last execution, levied on these subsequently acquired goods, as well as those first seized. If the goods first bought were fraudulently sold to Wellington, they were, of course, subject to the execution; and, if they were so mixed or confounded with other goods as that they could not be identified or distinguished, and Wellington failed to point out to the sheriff or designate the goods which were not subject to execution, the sheriff could not be liable for levying on the whole. But the sheriff would be bound, after the levy, on notice to him of the goods not liable, to restore them; but this notice must be specific, apprising him of and designating the particular goods improperly seized, and must be given previously to suit brought."

In *Zielke* v. *Morgan*, 50 Wis. 567 (7 N. W. 651):

"There was evidence which would have warranted the jury in finding, and the jury must now be presumed to have found, that these classes of goods were so mingled in and with the general stock of goods so taken by the respondent on the attachment, as to be indistinguishable, except by the appellant himself, and that the respondent had no knowledge of their identity, or that they were embraced in the stock, and that the appellant said nothing about them at the time of the levy.

"The appellant not only did not claim any parts of the stock by any particular right, irrespective of his purchase from his son, but made a claim utterly inconsistent with such particular right by claiming the whole stock by this fraudulent purchase, and thereby induced the respondent to believe that he had no other right. This not only constituted a waiver of his particular right by failure to claim it at the proper time, but it should operate as an estoppel. The appellant should now be bound by the state of facts which he then induced the respondents to act upon."

In 5 Current Law, p. 12, it is said that—

"It is the duty of a stranger to an execution, whose goods are so intermingled with those of the execution debtor that they cannot be readily distinguished, to designate them to the officer making the levy; and, if he fails to do so, the latter may levy upon the whole."

See, also, 4 Cyc. p. 555. See, also, *Zuehlke* v. *Stone*, 148 Mich. 478 (111 N. W. 1065). We think this rule is

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not inconsistent with *Wetherbee* v. *Green*, 22 Mich. 311 (7 Am. Rep. 653), and other cases cited by plaintiff.

These views require us to reverse the judgment; but, as the cause may be tried again, we discuss the question of damages. If the goods given by McCausey were worth only $250 when selected, and the plaintiff had sold some of them, it is sufficiently favorable to her to call those seized worth $250. The goods purchased by her amounted to $343.75, making a total of $593.75, or, as claimed, $605. She did business in the neighborhood of two weeks, realizing profits of some considerable amount, according to her testimony. Some of these goods were returned to her; and when it came to a sale she was able to regain all of them for $75 or $85. Yet a jury gave her a verdict of nearly $900, which was so plainly excessive that the trial judge required a large reduction as a condition for the denial of a motion for a new trial. The plaintiff claimed damages as follows:

(1) The value of the goods converted.
(2) The loss of profits during a period of some weeks pending her reopening two days after the sale.
(3) The loss of profits on certain alleged orders which she had taken.

1. The Value of the Goods Converted. The declaration attempts to combine in one count a claim for damages for the conversion of property and damages for the interruption. The measure of the former is the value of the property converted, or, if recovered, the cost of such recovery plus the amount of depreciation of the goods.

2. Damages for Interruption of Business. That one who, by an act of trespass, renders it impossible to conduct a going business is liable for damages, is settled for this State by the old case of *Allison* v. *Chandler*, 11 Mich. 542. It has been followed in other cases as late as *Hart* v. *Village of New Haven*, 130 Mich. 181, 186 (89 N. W. 677).

We are of the opinion that the cost of repurchase is not necessarily the full measure of damages in a case where a

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merchant is deprived of his entire stock. If he was doing a profitable business, and could show approximately the measure of his profits for a period preceding the unlawful interruption, and if he had contracts which could be shown to have included a profit, if performed, and he was prevented from performance, these facts would be proper evidence to go to the jury upon the subject of injury from interruption of his business. This proof would be subject to the inquiry of the necessity for the continuance of the interruption, and whether by the purchase of a new stock, or material for the performance of existing contracts, he could not in whole or in part have avoided or mitigated the damages; but, as we have said before in cases cited, a man who has certainly injured another cannot escape liability in an action of tort, through the difficulty of proving the exact amount of damage suffered. We think a fuller discussion of this question unnecessary, as the cases cited indicate the proper rule for instructing juries in such cases.

The judgment is reversed, and a new trial ordered.

MOORE, MCALVAY, and BROOKE, JJ., concurred with HOOKER, J.

BLAIR, J. As this record presents the facts, I concur. If upon another trial it appears that Wilson Bros. recognized the trust mortgage and participated in the dividends, I shall feel at liberty to reach a different result.

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MICHIGAN RAILROAD COMMISSION *v.* MICHIGAN CENTRAL RAILROAD CO.

MANDAMUS—RAILROADS—CONSTITUTIONAL LAW — MICHIGAN RAILWAY COMMISSION.

An order of the Michigan railroad commission fixing a minimum rate for excess baggage to be charged by steam railroads, not confiscatory in amount, is enforceable by mandamus although a proceeding in equity is pending on appeal in the Supreme Court for a determination of the legality of the action of such commission; an injunction to restrain the enforcement of the order having been denied in the chancery proceeding.

Mandamus by the Michigan railroad commission to compel the Michigan Central Railroad Company and others to put in force an order fixing certain excess baggage rates. Submitted November 16, 1909. (Calendar No. 23,675.) Writ granted February 3, 1910.

John E. Bird, Attorney General, and *Lucking, Emmons & Helfman*, for relator.

McPherson, Bills & Streeter (*O. E. Butterfield, James H. Campbell*, and *L. C. Stanley*, of counsel), for respondents.

MCALVAY, J. This is an application on the part of relator for a writ of mandamus to compel the respondent railway companies to put in force an order adopted by relator January 15, 1909, fixing a tariff of rates for excess baggage, and also to put in force the modification of said order made August 4, 1909. Relator is a body politic and corporate, known as the Michigan railroad commission, organized and existing under Act No. 300, Pub. Acts 1909, and is the successor to Michigan railroad commission, heretofore organized and existing under Act No. 312, Pub. Acts 1907. The order of January 15, 1909, was

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made by relator under the duties and powers vested in it by law, upon proceedings duly taken before it by petition filed July 10, 1908, and after a full hearing. After this order was promulgated and served, respondents, being dissatisfied, asserted their rights under the statute by proceeding against relator by bill in chancery in the Wayne circuit court to vacate and set aside such order as unlawful and unreasonable, praying that pending the determination of the validity of the order the commission be enjoined from making said order effective, and from commencing any proceeding to enforce compliance therewith. A temporary injunction was also asked. After a hearing the injunction was denied, and respondents then applied to this court for a writ of mandamus to compel the issuance of such injunction. A temporary stay of proceedings was granted, and after full argument the writ was denied. *Michigan Cent. R. Co.* v. *Wayne Circuit Judge*, 156 Mich. 459 (120 N. W. 1073). Afterwards the case came on for hearing before the circuit court on May 29, 1909. These respondents, who were the complainants, offered no evidence. All the evidence in the case was put in on the part of relators. A final decree denying relief was granted September 27, 1909. An appeal has been taken from such decree to this court, and is now pending.

On June 8, 1909, a petition was filed before relator by parties duly authorized by law so to do, complaining that the minimum charges fixed by the order of January 15th were unreasonable and excessive. This petition was answered by respondents, and was heard July 21, 1909; the hearing being confined to the consideration of minimum charges. After due consideration on August 4, 1909, relator made an order modifying the order of January 15th, and making a single minimum charge of 25 cents. This was the only modification made. After service of this order respondents, except the Grand Rapids & Indiana Railway Company, filed another bill to set aside and vacate the order of August 4th, and the order of January

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15th as affected by that order. Relator has answered this bill, denying all equities. Within a few days of the time when this last bill in chancery was filed, respondent Grand Rapids & Indiana Railway Company filed its bill in the Kent circuit court, in chancery, against relator, to vacate and set aside as invalid the order of August 4, 1909. Relator has answered this bill, denying all equities. The statute provides that the order fixing rates shall take effect and become operative in 20 days after service thereof, and all railroads to which the order applies shall make such changes in their schedule on file as may be necessary to conform with such order; that all rates fixed by the commission shall be in force and *prima facie* lawful and reasonable until finally found otherwise, or until changed or modified by the commission. The orders of the commission herein referred to have not been put in force and made effective by respondents. They neglect and refuse to comply with them. It appears from the records of these proceedings that on the hearing before the circuit court, and before this court in asking for a mandamus to compel the court to grant an injunction, respondents admitted that the rates fixed by the order of the commission were not confiscatory. We do not find that such claim is now made.

In the opinion of this court written by Mr. Justice GRANT, handed down when respondents' application for a writ of mandamus to compel the issuance of an injunction was denied, all of the facts in the case were stated at length. Reference is had to such opinion, to be read in connection with, and necessarily a part of, this opinion. *Michigan Cent. R. Co.* v. *Wayne Circuit Judge*, *supra*. Such reading clearly indicates the opinion of this court that the rates fixed in the order complained of should be operative and continue in force as provided by law. Since that time respondents have had opportunity, at the final hearing of the chancery case, to produce evidence in support of their contention, and have failed to do so. The circuit court found against them, and a final decree was

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entered accordingly. The fact that the case is now in this court upon an appeal from such decision does not, in our opinion, affect the question of the application of the statute. In fact the prospect of a term of years elapsing before a final determination of the questions raised is, under the circumstances of this case, a cogent reason why the legislature provided that the order should be effective during such delays. That in certain cases such orders ought to be suspended is probably true, but we think the authorities support the contention of relator that these orders should be put in force by respondents. *City of Knoxville* v. *Water Co.*, 212 U. S. 1 (29 Sup. Ct. 148).

The statute provides a remedy by mandamus. The writ will issue.

OSTRANDER, HOOKER, BROOKE, and BLAIR, JJ., concurred.

STARR PIANO CO. *v.* MORRISON.

1. SALES—CONDITIONAL SALE—CONSIGNMENT—REPLEVIN BY CONSIGNOR—ESTOPPEL.

   Under an agreement which provided that the consignee of the plaintiff's pianos might sell for cash or to responsible purchasers on credit, reserving a lien, no title passed to a purchaser who paid no cash but exchanged other property for the piano, in the absence of evidence tending to show that plaintiff is estopped to recover the property.

2. SAME—TITLE.

   Possession of personalty is merely *prima facie* evidence of ownership.

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8. SAME—CUSTOMS AND USAGES—PRINCIPAL AND AGENT.

The terms of a contract which clearly and explicitly give the consignee of a piano authority to sell, may not be extended by proof of a custom of piano dealers to make exchanges.

Error to Isabella; Searl, J., presiding. Submitted December 13, 1909. (Docket No. 181.) Decided February 3, 1910.

Replevin by the Starr Piano Company against John W. Morrison. A judgment for defendant is reviewed by plaintiff on writ of error. Reversed.

H. A. Sanford and *F. H. Dodds*, for appellant.

F. C. Wallington and *Francis McNamara*, for appellee.

HOOKER, J. Ray was a music dealer and carried on business at Ithaca, Mich., under the name of the Ithaca Music Company. In short, plaintiff claims that Ray and that company were one and the same person, the Ithaca Music Company being a trade-name which Ray had assumed and sometimes used. Ray, over his own signature, executed a contract with the Starr Piano Company, by which the latter agreed to consign pianos to Ray for sale. It fixed the terms on which they might be sold by Ray, and provided that sales should be settled for by Ray. It contained the following provisions:

"(1) The said company will (consign) to said party of the second part, to be sold for and on account of said company, pianos of such kind and quality and in such quantity or quantities as may be mutually agreed upon from time to time, upon the terms and conditions hereinafter set forth.

"(2) Said party of the second part shall offer or sell the goods consigned to him by said company, under the terms of this agreement, to parties residing in the counties of Gratiot and Isabella, State of Michigan. In assigning certain territory to an agent the Starr Piano Company do not thereby assume to pay commissions to said agent on other sales made therein.

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"(3) The terms upon which said party of the second part may sell said pianos are (*a*) for cash; (*b*) to responsible parties for part cash and part lien paper; (*c*) to responsible parties wholly on lien paper; (*d*) or the same may be mortgaged or leased as hereinafter set forth. When sold or leased and returns made therefor in cash to said company within thirty days after shipment thereof by said company, said party of the second part shall pay the invoice less 10 per cent., or if returns be made in cash after thirty days and before sixty days after shipment thereof said party of the second part shall pay the invoice price less 9 per cent., or if returns be made in cash after sixty days and before ninety days after shipment thereof, said party of the second part shall pay the invoice price less 8 per cent., or if returns be made after ninety days and before four months after shipment thereof said party of the second part shall pay the invoice price less 8 per cent. If returns shall be made after four months from date of shipment, interest at the rate of six (6) per cent. per annum shall be added to the price of the invoice and continued until such time as the Starr Piano Company is paid all amounts, due on such instrument in full, except that a discount of 8 per cent. shall be allowed for cash. * * *

"(12) No part of this agreement shall be construed as in any manner whatever divesting the Starr Piano Company of absolute ownership in every piano shipped by it to said party of the second part, or to any person or persons said party of the second part may direct the same to be shipped, until all demands due or owing to said company for such piano, with interest and expenses as aforesaid, shall have been fully paid."

The piano in question was sent to Ray, who receipted as follows:

"DETROIT, MICHIGAN, August 17, 1907.
"Consigned by the STARR PIANO COMPANY,
"Manufacturers of High Grade Pianos,
"To the ITHACA MUSIC CO.,
"Ithaca, Mich.
"Terms as per contract.
"One Starr Piano, Style R. No. 54,739. Price $400.
"Received the above described piano, in good order and condition in all respects, and we agree to sell the same for account of the Starr Piano Co., and account to them or their authorized agent for the full value as above,

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and that no expense or claim of any kind shall be made against the above described piano while we hold the same for sale, and that the above described piano shall continue to be the property of the Starr Piano Company, until the same is fully accounted for at value as above mentioned, as per contract. After four months from date of shipment, and until accounted for, six per cent. interest shall be charged us, but with the understanding that we will account for said piano within four months from date, and if not accounted for at the expiration of that time said piano to be returned to the Starr Piano Company upon their order at our expense, either to Detroit, Michigan, or any place where they may direct, provided the rate of freight does not exceed that to Detroit, Michigan.

[Signature] "ITHACA MUSIC CO.,
"By F. J. Ray, Prop."

Both contract and receipt bore the same date, and there is nothing to indicate that any other piano was received under the contract. Plaintiff was never paid for the piano. Ray had previously sold a Stiger piano to a man named Morrison for which his consignor claimed he had not paid. Being anxious to get the Stiger piano into his possession to save trouble, he (Ray) sent an employé to see Morrison, with instructions to trade the piano involved in this suit to Morrison for the Stiger, and this was done; the exchange being even. Plaintiff replevied the piano in this action, and appeals from an adverse verdict and judgment.

This piano was delivered to Ray with express authority to sell, and, while no title passed upon its delivery to Ray, the plaintiff may be estopped as against a bona fide purchaser who relied on Ray's authority to sell from an assertion of title. See 6 Am. & Eng. Enc. Law (2d Ed.), pp. 486, 487, and Michigan cases cited, and pages 482 and 483 and notes; *Pratt* v. *Burhans*, 84 Mich. 489 (47 N. W. 1064, 22 Am. St. Rep. 703); Williston on Sales, § 317 and notes, section 329 and notes, and section 338 and notes; 1 Benjamin on Sales (Am. Ed.), §§ 448, 449; *Columbus Buggy Co.* v. *Turley*, 32 L. R. A. 260 (73 Miss. 529, 19 South. 232, 55 Am. St. Rep. 550), and cases cited therein. It was not error to leave the question of defendant's *bona*

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fides to the jury, unless the fact that he traded the old piano for the new one was an act not within the scope of Ray's authority. It is contended by defendant's counsel that plaintiff gave Ray a general authority to sell its pianos, which gave him power to trade under the general custom, and, furthermore, that the defendant was not bound to inquire regarding limitations and secret instructions contained in the contract of agency or sale; while plaintiff contends that defendant's purchase was not authorized by the authority given nor was it a sale in the course of trade, nor was the purchase made in reliance upon any authority given, or any holding out of Ray as authorized to sell or trade the piano. What did the defendant know about Ray's title and right to sell? Only this: The offer of the piano at his place by Ray's salesman and his representation that it was Ray's piano. This was no more than the representation of Ray. The possession of the piano was no more than *prima facie* evidence of Ray's ownership, for it was as consistent with other theories; *e. g.*, that he was a bailee or wrongdoer. See Mechem on Agency, § 786.

These things were not enough to estop plaintiff. What is there then to estop him that came to defendant's notice? Not his contract surely, nor the fact that he had authorized Ray to sell, nor that he so held out to the defendant, nor even the fact that plaintiff had ever been the owner. He did nothing inconsistent with his claim that ever came to defendant's notice, or upon which he relied, or which induced his belief in Ray's ownership. Hence there is no estoppel in this case. Mechem on Agency, § 787.

It follows that the defendant must rely upon the actual authority given by the contract. It is silent upon the subject of exchanging. It gives authority to sell and to lease, but it provides in plain terms for cash and notes in payment, and is explicit in defining the terms on which the pianos may be sold. There is nothing in it which justifies an inference that the parties intended sales to be made in any other way, nor can the contract, which is clear and

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explicit, be enlarged by proof of a custom on the part of piano dealers in general to exchange pianos. Mechem on Agency, § 352. The fact is obvious that Ray's agent went to the defendant with a falsehood, and bartered plaintiff's instrument, which he had not a right to do, instead of selling it, as he may have had a right to do. Had defendant known or supposed he was dealing with plaintiff's agent, and even had a right to suppose that he had authority to sell, without further inquiry, he should have known that the exchange made was not within an authority to sell. See Mechem on Agency, §§ 326, 352.

Upon the undisputed facts a verdict should have been directed for plaintiff.

The judgment is reversed, and a new trial ordered.

MONTGOMERY, C. J., and OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

GRAND TRUNK RAILWAY COMPANY OF CANADA *v.* WOLCOTT.

1. CANCELLATION — REFORMATION OF INSTRUMENTS — MISTAKE — EQUITY.

   The court of equity has jurisdiction to cancel a written contract from which a material clause has been omitted by mistake, upon a bill to reform the agreement, to enjoin an action at law on it, and for general relief.

2. SAME—EQUITY—CLEAN HANDS—PUBLIC POLICY—RESTRAINT OF TRADE.

   The objection that the complainant does not come into court with clean hands, because the contract is an attempted restraint of trade, is not sustainable in a proceeding to which the public is not a party, when the agreement merely provides that a siding should be constructed to defendants' mill to connect with the complainant's track and that the defendants should not engage in elevator business in connection with any building on the siding.

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Appeal from Macomb; Erskine, J. Submitted December 13, 1909. (Docket No. 124.) Decided February 3, 1910.

Bill by the Grand Trunk Railway Company of Canada against Anson E. Wolcott and John P. Wolcott, copartners as Wolcott Bros., to restrain an action at law, and for the reformation of a contract. From a decree for complainant, defendants appeal. Affirmed.

The bill is filed to restrain proceedings at law, to reform a written instrument, and for general relief. The court found that the instrument ought to be canceled, and not reformed, and ordered it to be delivered up to the register of the court for cancellation, provided complainant paid to defendants the sum of $75; "said payment being the terms upon which the relief by cancellation is granted." Defendants have appealed. Under date March 18, 1901, after considerable correspondence between them, oral and written, the parties entered into a written agreement for the construction of a siding from complainant's track and right of way to defendants' mill, and for the use and maintenance of such siding. Clause 21 of the agreement, which appears to have been written in ink upon a printed form, reads:

"(21) The contractor [defendant] agrees, in consideration of the premises, that he will not engage in an 'elevator business', so-called, in connection with any building or buildings to which this siding is laid, or in connection with any building which may be hereafter erected and reached by said siding; but will confine his business strictly to a 'milling business,' so-called."

The siding which this agreement provided for was not constructed. Defendants purchased land upon which a more satisfactory siding could be constructed. A new survey was made. A new agreement for a siding, also in writing, dated July 19, 1901, was executed by the parties. It did not contain the clause 21 above referred to.

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The first contract was canceled by mutual consent. The siding was constructed. Thereafter it came to the knowledge of complainant that defendants were doing an elevator business. A controversy arose; complainant claiming that the substance of clause 21 of the first agreement should have been inserted in the second agreement, and had been omitted by mistake. Complainant meantime refused to furnish cars upon the siding, gave the notice for termination of the agreement which both agreements expressly provided for—a three months' notice—and finally removed connections so as to prevent use of the siding. Later the parties executed a new agreement, which bears date July 19, 1902, which contains a clause similar to that one numbered 21 in the first agreement and, also, the following:

"It is hereby agreed that two certain written agreements between the above parties, the one dated March 18, 1901, and the other dated July 19, 1901, are canceled and all rights under them terminated from the delivery hereof, they being superseded by this agreement."

The suit at law, begun October 9, 1906, was brought to recover damages for failure and for refusal of complainant to furnish cars on the siding during the period it is claimed the second agreement was in force. The bill of complaint charges that the restrictive clause was omitted from the second agreement by mistake.

OSTRANDER, J. (*after stating the facts*). It must be assumed, I think, that the railroad company violated the terms of the agreement of July 19, 1901, and that defendants have a right of action, at law, for any resulting damages, unless (1) all rights under the agreement were surrendered when the last contract was made; or (2) unless equity ought to and may treat the said second agreement as an agreement entered into by mutual mistake of the parties. The first point is argued at some length by counsel for appellants. It is not asserted by complainant as a ground for equitable relief. We do not consider it.

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As to the second point: The complainant had leased land to one McIntyre, who had a siding, and who operated an elevator. The route for the siding first surveyed and agreed about was across the land leased to McIntyre. Complainant considered itself under some obligations to McIntyre to prevent competition in the business of buying and shipping grain at this point. It also believed, or assumed, that one elevator was sufficient for the local business of buying and shipping grain. These facts and views furnish the reasons asserted for the restrictive clause in the first contract with these defendants. As has been stated, the clause was written in ink upon a printed form, taking the place of a printed clause in the form bearing the same number. Defendants, having purchased land to secure a more suitable siding, and one which did not cross land leased to McIntyre, received and executed the second contract, a copy of which was later returned to them, which did not contain the restrictive clause. Complainant asks the court to find that the omission of this clause from the second contract was an inadvertence, oversight, mistake, on the part of complainant, and to find, further, that defendants had no reason to expect, and did not expect, to receive a contract with the clause omitted therefrom; in short, to find that the actual intention of both parties was to make a contract for a siding which should not be used in connection with an elevator business. That this was the original intention of the parties cannot be doubted. The division freight agent of complainant, in a letter of December 24, 1900, sending all papers in the matter to the local agent at Mt. Clemens, said:

"If the contracting parties are prepared to enter into an agreement to confine their business to milling and not engage in the elevator business at that point, I will recommend the building of the proposed side track on the terms. * * * If they wish to accept these terms, they must so state to you in writing, which attach to these papers and return."

Mr. A. E. Wolcott, then proprietor of the mill, did write, in reply,

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"I am perfectly willing to accept the terms as offered by your company."

I find no testimony tending to prove that any other or different understanding was arrived at, excepting, of course, the terms of the second contract. There is testimony on the part of defendants tending to prove that before the second contract was executed defendants had assurances from the proper officer or officers of complainant that they would be permitted to ship out grain bought locally out of condition for milling purposes, and that when they were requested to surrender the second contract, and did do so, they expected the restrictive clause to be inserted, but modified in accordance with such assurances. When it was returned to them, containing the same restrictive clause as appeared in the first contract, they mutilated the duplicate which had been sent to them, and returned it to complainant. It also appears that after it was discovered that the second contract did not contain the restrictive clause in question, and after defendants had been notified that the form of the contract must be corrected, defendants, on January 11, 1902, after cars had been refused them, wrote to the division freight agent, the officer of complainant who had charge of the matter, upon whose recommendation alone such sidings were installed, the following:

"If you consider that your company is under no obligation to receive grain from our siding, and that this is in accordance with Mr. A. E. Wolcott's agreement with you, then we are perfectly willing to let the matter stand as it is. As soon as convenient, please send bill in full for labor and material, and we will send check to balance."

From this and other evidence I am satisfied that the second contract did not set out the agreement of the parties, and that defendants understood that it did not. I am satisfied, also, that the execution and delivery of such a contract was an inadvertence on the part of complainant.

Appellants' contentions are: *First*, that the bill prays for reformation, and not for rescission, of the contract;

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second, that there is no testimony tending to prove a mistake; *third*, that the contract has been recognized and canceled; *fourth*, if any mistake was made, it was due to the negligence and carelessness of complainant; *fifth*, the complainant's hands are not clean; *sixth*, rescission ought to be upon terms which will place the defendants *in statu quo; seventh*, the rights of the parties can be determined at law. If, in fact, the contract does not express the agreement and understanding of the parties, and if the failure to express the actual understanding is due to inadvertence of one party, the other contentions which are made are, save only the fifth one, technical, rather than meritorious.

The fifth contention is grounded in argument, upon the theory that complainant's objections to entering into a contract without the restriction, and its conduct towards defendants after the contract was executed, are alike unconscionable; that the purpose of the restrictive clause was to prevent competition with McIntyre, and the whole arrangement was opposed to public policy and in restraint of trade. It is a sufficient answer to say that both this and the lawsuit are adversary proceedings, to which the public is not a party. In the lawsuit defendants seek to recover damages for the breach of an alleged agreement. If no such agreement as is counted upon was actually made, there ought to be no recovery for its breach. The contract which was actually made was mutual. The writing made to evidence it does not express the mutual understanding. The contract was not one which complainant was compelled to make. It related to matter of mutual convenience and profit. Further than this we are unable to say that the restrictive clause in the contract was intended to restrain trade, or that such would be its effect.

The fact that the bill prays specifically for reformation, and not for rescission, of the contract is not, in view of the testimony, and in view of the prayer for general relief, material. The purpose of the bill is to remove—get

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rid of—the written evidence of the contract relied upon in the suit at law. If it does not state the real understanding of the parties, it ought not to be usable in any proceeding brought to enforce it, or in one brought for damages for its violation. It may be that in a particular case it should be annulled and canceled upon terms. In this case we find no ground for saying that the terms made by the court below are not sufficiently liberal to defendants. The testimony is rather convincing that defendants have suffered no damages; that although they received and joined in executing the written evidence of a contract favorable to themselves, which they had not in fact made, they did nothing, suffered nothing, in reliance upon it for which complainant should compensate them.

The decree of the court below is affirmed.

MONTGOMERY, C. J., and HOOKER, MOORE, and MCALVAY, JJ., concurred.

DENNIS *v.* FIDELITY MUTUAL LIFE INSURANCE CO.

1. INSURANCE—DEFENSES—CONTRACTS—EXECUTION.
   In an action on a life insurance policy which had never been delivered to the insured during his lifetime, and on which the first premium was not paid, the defense that the nonpayment of the premium was in violation of the express terms of the agreement, was not waived by a letter refusing to furnish blank proofs of loss on the ground that no delivery had been made and the first payment was not received by the company or its agent.

2. SAME—LIFE INSURANCE—WAIVER.
   The consent of an agent for a life insurance company to accept a note for part of the first payment on a policy which

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was not delivered to the insured before his death, the note never having been executed, is not a waiver of the condition in the policy requiring full payment as a condition precedent.

8. SAME—EVIDENCE—EXCLUSION AND ADMISSION OF TESTIMONY. It was not error to exclude from evidence testimony tending to show that the premium was charged by the defendant to its agent, that statements of the amount due had been mailed to the insured, that the agent had given a bond to secure the company and that the policy had been returned to the company, after an unauthorized delivery, by reason of threats.

Error to Wayne; Brooke, J. Submitted December 13, 1909. (Docket No. 36.) Decided February 3, 1910.

Assumpsit by Lizzie S. Dennis against the Fidelity Mutual Life Insurance Company on a policy of insurance. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Jonathan Palmer, Jr. (*Elbridge F. Bacon*, of counsel), for appellant.

Lucking, Emmons & Helfman, for appellee.

HOOKER, J. Houghton was a solicitor for the defendant life insurance company. He solicited one Dennis to take a policy with said company, and in the course of the negotiations Dennis was informed that the payment of the first premium could be in cash, or half cash and note, as should be arranged when the policy should be delivered. He thereupon determined to apply for a policy, and signed a written application for a policy of $2,000. This application contains this agreement, viz.:

"That the policy issued hereon shall not become binding on the company until the first payment due thereon shall have been actually received by the company or its authorized agent and the policy delivered to me during my lifetime and continued good health."

It was dated January 19, 1906, and was sent to defendant's home office, and a policy was executed and returned

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to the general agency in Detroit, and by a clerk in that office to Houghton, who was expected to collect the premium and deliver the policy. Upon the back of this policy was the following:

"General Precedent Conditions. The application, copy of which is given on third page, forms the sole basis of this contract, which shall not be operative or binding until the actual payment of the initial premium, and delivery of the policy during the lifetime and good health of the insured."

Houghton saw Dennis several times, and the latter made some promises to call and pay for the policy, which he did not keep. On the other hand, he called twice in Houghton's absence to see about the matter, and on one of the occasions when the parties met the policy was looked over, and considered. It seems that there had been a change in the statement of the applicant's age as first stated from 57 to 58 years, which had the effect of increasing the rate from that contemplated by the parties. At all events the matter was not closed up by payment and delivery of the policy.

The plaintiff testified that Houghton called on February 26th about 9 a. m., showed the policy to her ready for delivery, and she told him that Mr. Dennis would settle with him in the afternoon, and take the policy. Houghton replied: "Very well, Mrs. Dennis; it will be all ready." Dennis died the same morning, between 10 and 11 o'clock. Dr. Bailey was Dennis' physician. He was informed of Dennis' death by telephone, in the afternoon. Bross, a relative of the Dennis family, came to his office that afternoon, and Houghton was telephoned for. On his arrival Bross paid the premium to Houghton in cash, and the policy was delivered to Bailey, and he delivered it to Mrs. Dennis. Houghton testified that Bailey told him of the death of Dennis before any money was paid, and that the policy was delivered to Dr. Bailey or Bross, on the agreement that, if it was not right for Houghton to deliver it, they would get the policy and return it to Houghton, which

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was afterwards done, and the money was returned to Bross. This action was afterwards commenced, and the learned circuit judge directed a verdict for the defendant, upon the ground that, under the contract consisting of the application and policy, and the admitted fact that there was no payment of premium or delivery of the policy until after Dennis was dead, plaintiff could not recover. Assuming, but not deciding, that Houghton had authority to accept cash, part cash and part note, or note in full payment of the first premium, the admitted fact remains that during the life of the applicant no payment of any kind was made or tendered, nor was the policy delivered to him, or any one for him. Under the express terms of both application and policy the latter was not to become binding or operative until the initial premium should be paid, and the policy delivered during the lifetime and continued good health of the applicant.

Counsel for plaintiff contend:

(1) That the defendant waived its right to insist on the nonperformance of this condition, by not basing its claim of nonliability on this ground in the letter of January 15, 1907. That letter was written in answer to a request for blank proofs of loss, made on behalf of the plaintiff. It is as follows:

"Mr. JONATHAN PALMER, Jr.,
"Moffat Building,
"Detroit Mich.

"*My Dear Sir:* Answering yours of the 10th inst., would say that while Mr. George M. Dennis made application to this company for a policy of insurance on his life, and the above-numbered policy was issued, such policy was never delivered to Mr. Dennis in his lifetime, and no payment whatever on account thereof was ever made by him. The application provided that the applicant expressly agreed 'that the policy issued hereon shall not become binding on the company until the first payment due thereon shall have been actually received by the company or its authorized agent, and the policy delivered to me during my lifetime and continued good health.' The policy never having been delivered to Mr. Dennis or the

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first premium paid, there was no contract of insurance and Mrs. Dennis has no valid claim against this company by reason of the transaction, we therefore do not comply with your request to send you blank forms for making proof of death and presentation of a claim by her under the policy.

"Very truly yours,
"F. H. CALKINS,
"Sup't Claim Dept."

(2) The court erred in instructing the jury that:

"I have permitted the plaintiff to put in testimony relating to the custom of settlement and the extension of time and so on, but I charge you that all that testimony becomes immaterial in view of the admitted facts that no settlement of any kind was made for this policy until five hours after the captain's death.

"It is an unfortunate thing that the insured and his family permitted the matter to rest until it became too late to comply with the law in such a manner as to make this insurance available for his family, but under the admitted facts in the case, and there is no dispute about any of them that are material to the issue, I feel constrained to direct a verdict of no cause of action."

(3) That the court erred in excluding evidence to show that when the policy was delivered to Houghton he was charged by the company with the amount of the premium.

(4) That the court erred in excluding an offer to show that Houghton gave a bond to the company to secure any indebtedness which he might owe it for moneys collected on policies, or on policies delivered to him for delivery to other parties.

(5) That the court erred in excluding an answer to the question put to Miss Hutchinson, "Why was it [the policy] returned?"

1. Estoppel. We are of the opinion that the letter quoted clearly implied that the defendant relied on the defense afterward made.

2. Waiver of the Condition. This claim is based on an alleged agreement to give time on this premium; *i. e.*, to

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take cash or note in settlement for the premium. There is nothing to show that any one expected that the policy would be delivered until it should be settled for in one of these ways, and there is no evidence that warrants the belief that anybody expected that the policy would be delivered or become binding, and that the agent Houghton would trust the assured for the premium without payment by cash or note and delivery of the policy. The fact that the applicant called at the insurance office ostensibly to make settlement by note for the policy, and, upon being informed that he could not do so without seeing Mr. Houghton, with whom his negotiations were pending, went away, indicates no waiver, nor was it such an offer of payment as to make the policy operative. He afterwards saw Houghton several times, who repeatedly asked him to settle, but he put him off for one reason or another. There is no evidence in the case justifying an inference that there was any agreement that the agent would deliver the policy until it was settled for, or that it should be operative meantime. Much authority is cited on the subject of a forfeiture that is inapplicable.

3, 4, 5. Exclusion of Testimony. Upon this record the rulings on the admission of testimony complained of cannot affect the result. Whether this premium was charged by the company against the agent or not, it conclusively appears that neither party expected delivery of the policy until settled for. The agent had a right to protect himself by a settlement before permitting the policy to become operative. Moreover, there is nothing that indicates that the statements alleged to have been mailed or sent to Houghton were more than memoranda of policies, sent to him for delivery, showing the amount of premiums upon them. The exclusion of proof that Houghton had given a bond to the company was proper, as that fact would not prove whether the company had accepted Houghton's promise for the premium. Neither was it of any importance whether the policy was returned by reason of threats. The case would be no different had it not been surrendered;

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for, measured by the express terms of both application and policy, the delivery was not such a delivery as the contract required, and was a fraud on the insurance company by the parties obtaining and the agent permitting it.

Upon the undisputed proof in this cause there was no alternative but to direct a verdict for the defendant. Judgment affirmed.

MONTGOMERY, C. J., and MOORE, MCALVAY, and BLAIR, JJ., concurred.

REESE *v.* DETROIT UNITED RAILWAY.

1. CARRIERS — STREET RAILWAYS — NEGLIGENCE — STARTING AND STOPPING CARS.

   That while plaintiff was proceeding from her seat in defendant's car to the door, the conductor signaled for the car to start and the jerk threw and injured plaintiff, presents a question of fact for the jury in an action for negligent injuries.

2. EVIDENCE—MASTER AND SERVANT—HEARSAY—ADMISSIONS.

   No error is committed in such action by the admission of testimony as a part of the *res gestæ* that the conductor stated he thought the plaintiff was off the car, where the conductor testified on direct and cross-examination as a witness for the defendant to the same fact.

3. TRIAL—ARGUMENT OF COUNSEL.

   Incorrect statements of the law made by the plaintiff's attorney in argument were cured by the prompt action of the trial judge.

Error to Wayne; Mandell, J. Submitted December 13, 1909. (Docket No. 138.) Decided February 3, 1910.

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Case by Henrietta I. Reese against the Detroit United Railway for personal injuries. A judgment for plaintiff is reviewed by defendant on writ of error. Affirmed.

Corliss, Leete & Joslyn (*Benjamin S. Pagel*, of counsel), for appellant.

Lucking, Emmons & Helfman, for appellee.

MOORE, J. The plaintiff recovered a judgment for injuries received by her while a passenger on one of the cars of defendant company. The case is brought here by writ of error.

The car on which plaintiff became a passenger had three entrances, one at the rear, one in the middle of the right-hand side, and the third at the front. The seats ran at right angles to the sides of the car so that passengers when seated faced the motorman. The aisle ran along the right-hand side from the rear to the front door. Mrs. Reese and her friends occupied a seat about opposite the middle door, with Mrs. Reese sitting at the end of the seat farthest from the door; her daughter sat at her right side and her friend Mrs. Claxton next to the daughter. Another woman occupied the remaining space of the seat. As the car proceeded down town, numerous passengers were picked up along the route, and by the time the car got to Broadway, the street on which plaintiff is alleged to have been injured, all the seats were occupied, and many people were standing in the aisle. The conductor gave the signal to stop and the car was brought to a standstill at the intersection of two streets. The conductor stood on the rear platform just outside the rear door. Several people alighted from the steps at the rear platform. The conductor looked along the outside of the car to the steps opposite the middle door and seeing no one on the steps or about to step from the aisle of the car, signaled the motorman to go ahead. The car was started immediately, and it is the claim of plaintiff that while she was still going toward the door to alight she was thrown forward and badly hurt,

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and that there was negligence on the part of the employés of defendant in starting the car before she had an opportunity to alight.

Appellant's grounds for appeal are stated by counsel as follows:

"(1) That a verdict should have been directed in behalf of the defendant and appellant at the trial of the said cause.

"(2) If defendant's negligence was a question for the jury, error was committed in allowing testimony to be introduced which was incompetent and immaterial.

"(3) That error occurred in the charge of the court.

"(4) That error occurred in the argument of counsel for plaintiff and appellee."

We will take up these claims in the order presented.

1. Did the court err in declining to direct a verdict for defendant? The conductor was a witness. He testified there were 40 to 60 passengers on the car.

"*Q.* Tell what took place.

"*A.* I got the signal, I got the signal to stop, and gave my motorman the bell to stop. I was standing on the back platform, right you may say in the doorway, so the passengers could go either side out of the door or in behind me on the platform. Three or four got off at the rear platform and I looked at the side door to see if any one was getting off there. There was no one and I gave the bell to go ahead, and I don't know whether a gentleman or lady hollered 'Wait a minuite,' and I had not let loose of the bell rope, and I gave him a bell to stop, and he stopped, and then I walked right inside to see what was the trouble in there, and I would not say whether this lady or that lady said to me, 'It is a wonder you would not wait until we get off,' and I said, 'I supposed you were all off,' and she said, 'No,' and I don't know whether I made the remark about getting off or not, but some one said, 'Go ahead, we will go on down town.'

"*Q.* When you referred to getting off, to whom did you refer?

"*A.* I was talking to those two ladies at the time, so it would practically be to them.

"*Q.* Did your car stop when you gave the signal to stop the second time?

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"*A.* It did.
"*Q.* How far had it gone between the two stops?
"*A.* I would not imagine it had gone over six feet."

On the cross-examination he testified, in part, as follows:

"*Q.* As I understand you, there is no dispute but what your car stopped at John R. street.
"*A.* It did.
"*Q.* You say some people got off the back platform?
"*A.* They did.
"*Q.* You thought every one was off?
"*A.* Yes, sir.
"*Q.* You looked along the outside of the car?
"*A.* Yes, sir.
"*Q.* You did not look inside?
"*A.* No, sir.
"*Q.* You supposed every one was off and you rang up for the motorman to go ahead?
"*A.* Yes, sir.
"*Q.* And you discovered these people were not off?
"*A.* I discovered by some one hollering, 'Wait a minute.'
"*Q.* You looked inside the car?
"*A.* Yes, sir.
"*Q.* You could see them there?
"*A.* Yes, sir.
"*Q.* See this lady standing up by the door?
"*A.* Yes, sir.
"*Q.* You say the plaintiff was thrown back in the seat?
"*A.* I don't know whether she was thrown back.
"*Q.* She was back there when you got there?
"*A.* When I got there she was there.
"*Q.* There is no doubt about any of these facts in any way?
"*A.* No, not exactly."

There was other testimony to the effect that when the car was stopped plaintiff at once arose and started toward the door; that while she was standing and awaiting her turn to step down upon the steps the car was suddenly started and she was thrown forward and hurt. This state of facts presented a case for the jury. See *Finn* v. *Railway Co.*, 86 Mich. 74 (48 N. W. 696); *Kirchner* v. *Railway*, 91 Mich. 400 (51 N. W. 1059); *Selby* v. *Railway*,

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141 Mich. 112 (104 N. W. 376); *Burke* v. *Electric Co.*, 147 Mich. 172 (110 N. W. 524); *Hazen* v. *Electric Co.*, 152 Mich. 457 (116 N. W. 364); *Beattie* v. *Railway*, 158 Mich. 243 (122 N. W. 557).

2. Did the court err in the admission of testimony? This assignment is based upon the admission of testimony that the conductor stated he "thought they were off." It is said these were declarations concerning past events by an agent who has no authority to speak for his principal. There are two answers to the objection, *first*, the conductor, a witness for the defendant, testified both on his direct and on his cross examination to the same thing, and *second*, because the statement was made during the happening of the event and was part of the *res gestæ*. *Ensley* v. *Railway*, 134 Mich. 195 (96 N. W. 34); *Plefka* v. *Railway*, 155 Mich. 53 (118 N. W. 731).

3. Did the court err in its charge? The court gave all of defendant's requests to charge except:

"(4) The only evidence before you as to the action of the conductor is his own testimony, and if you believe his statement, plaintiff is not entitled to recover.

"(5) In weighing the testimony of the conductor, you should consider it without any prejudice one way or the other."

The fourth request was not according to the fact. As to the fifth request the jury were charged as follows:

"You sit here as judges of the facts, and as judges of the facts you must not put yourself in the place of either the plaintiff or the defendant, because, if you do, you bring into play a kind of sympathy either for the plaintiff or the defendant. You are to sit here in the solemn capacity of judges, absoluely free from any bias or prejudice or sympathy or any like human emotion, sit here calmly and judicially and determine first what the facts are and then determine from those facts the things I have instructed you you must determine, what things can properly and reasonably be inferred from the facts that have been adduced here from the witness stand. Your endeavor in the jury room should be to arrive at a just, and

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honest, and fair verdict under the evidence in this case, and you should be actuated by no other motive."

There was no reversible error in the charge.

4. Argument of Counsel. It is said counsel erred in stating to the jury what the law is, and what the court will charge. As far as any error was committed in this respect, the mischief, if any, was immediately cured by the trial judge. It is said counsel erred in his argument to the jury as to the amount of damages it should give plaintiff. It was the claim of plaintiff that the results of the injury were very grave, making her a cripple for life. There was testimony in support of her claim. We think in this part of the argument nothing was said by counsel which calls for a reversal of the case.

Judgment is affirmed.

MONTGOMERY, C. J., and OSTRANDER, HOOKER, and MCALVAY, JJ., concurred.

HULAN v. WAYNE CIRCUIT JUDGE.

1. INJUNCTION — MANDAMUS — ENJOINING ENFORCEMENT OF JUDGMENT AT LAW.

In a suit to enjoin the enforcement of a judgment in proceedings at law for the possession of land, an order of the circuit judge, after hearing the cause on the merits, providing that the preliminary injunction be dissolved, and unless complainant secure the defendant for the rental value of the premises pending her appeal from a decree dismissing the bill, in addition to the statutory appeal bond, the judgment at law should be enforced, is a discretionary matter which will not be reversed on mandamus.

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2. SAME—DISSOLUTION.
The dissolution of a preliminary injunction is largely within the discretion of the circuit judge.

3. SAME.
A preliminary injunction which has been dissolved on the coming in of defendant's answer upon motion, or upon the final hearing, is not revived by the appeal.

4. SAME—APPEAL AND ERROR.
After such dissolution, if the complainant who has appealed have just cause for apprehension, he may apply to the Supreme Court for an injunction to preserve the *status quo*.

5. SAME—EFFECT OF INJUNCTION UPON JUDGMENT AT LAW.
An injunction staying proceedings at law in a pending case does not affect the validity of the judgment therein, obtained in disobedience of the injunction.

6. SAME—APPEAL AND ERROR—STAY OF PROCEEDINGS.
Where a conditional order is entered permitting the execution of the judgment at law, the appellee must comply with the condition or rely on such protection as is afforded by the appeal bond, which does not continue the protection afforded by the preliminary injunction.

Mandamus by Anna Stella Hulan to compel James O. Murfin, circuit judge of Wayne county, to vacate certain provisions in an order granting an appeal. Submitted December 14, 1909. (Calendar No. 23,732.) Writ denied February 3, 1910.

E. A. Fink, for relator.

Denton Guinness (*Robert M. Brownson*, of counsel), for respondent.

BLAIR, J. On the 11th day of June, 1909, respondent directed a verdict against relator, and in favor of the holders of the record title to certain lands, as grantees of her father, in summary proceedings to recover the possession of said lands, of which relator claimed to be the equitable owner by virtue of an oral agreement with her father. On the 24th day of June, relator filed her bill of complaint for the enforcement of the alleged oral agreement, pray-

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ing, among other things, that the deed from her father, and the judgment at law in favor of the grantees therein, be vacated, and that a temporary injunction issue to stay proceedings under said judgment. Relator having filed a bond in the penal sum of $500, a temporary injunction was issued. After the hearing of the case, and on the 25th day of October, 1909, respondent entered a decree dismissing the bill of complaint and dissolving the injunction. Thereupon relator obtained a stay of proceedings for 20 days, and the court fixed the penalty of the bond on appeal from said decree at the sum of $300. Relator having presented an appeal bond for approval, and the defendants having presented an application for a writ of possession to enforce their judgment at law, respondent entered an order approving said appeal bond, and further providing:

"That the application for the issuance of a writ of possession in the law case referred to in said complainant's bill of complaint be and the same is hereby granted, unless said complainant shall, within two days from the date hereof, file a good and sufficient bond, conditioned for the payment of $45 per month, as stipulated damages, during her occupancy of the premises referred to in said complainant's bill of complaint, and during the pendency of her appeal, providing said complainant should not prevail in said appeal."

Thereupon relator—

"Made and presented to the court a motion for the vacation of that part of the order of the court above quoted, at the same time filing a claim of appeal to this court from said decree, and also tendering said appeal bond of $300, and moving the court thereupon for a *supersedeas* or stay order, which, pending the appeal, should stay all proceedings, including the issuance of said writ of possession, at the same time also offering to put in an appeal bond or stay bond in such sum or penalty as the court might designate, to take the place of said $300 appeal bond, if upon reconsideration the court deemed the penalty of $300 insufficient, and requesting the court, if he so considered, to name such sum or penalty as he should require for that purpose."

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Respondent's return, among other things, contains the following:

"Respondent further submits that in my opinion, where a bill seeking to enjoin proceedings at law has been dismissed after a hearing, the continuance of the temporary injunction contrary to the provisions of the final decree is entirely a matter of discretion, and can only be done on such terms as in the opinion of the court shall be deemed just to all parties. In this case, having tried the lawsuit and the chancery case, I am convinced the complainant is not entitled to relief. However, she is still in possession, and is a person of no financial responsibility. If she desires to continue in a position to which she is not entitled, the defendants should be amply compensated. For these reasons I feel that if the proceedings on the lawsuit are to be further enjoined, she should furnish, in addition to the appeal bond, a special statutory bond staying the proceedings on the lawsuit as already ordered."

An order has been issued out of this court requiring the respondent to show cause why that portion of his order relating to the stay bond above quoted should not be vacated, and why he should not approve the bond tendered, or, if he considers the penalty insufficient, fix a reasonable penalty, with conditions as prescribed by the statute. Act No. 299, Pub. Acts 1909.

Counsel for relator contend that the effect of compliance with the provisions of sections 4 and 6 of said Act No. 299, is to bring the case into the Supreme Court in its entirety, and to stay all proceedings during the pendency of the appeal, citing *Wilkinson* v. *Dunkley-Williams Co.*, 141 Mich. 409 (104 N. W. 772). *Second*, that the statute prescribes the condition of the bond to stay proceedings, and no different condition can be required. The defendants are not taking or contemplating any proceedings under the decree appealed from, but under their judgment at law; the temporary injunction which restrained them from taking such proceedings having been dissolved. So far as the legal aspect of the case is concerned, the rights of the parties are no different than though the preliminary injunction had been dissolved upon motion of defendants

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prior to the final decree. The dissolution of a preliminary injunction is largely within the discretion of the circuit court. *Grand Rapids Electric R. Co.* v. *Calhoun Circuit Judge*, 156 Mich. 419 (120 N. W. 1004). A preliminary injunction, which has been dissolved on the coming in of defendant's answer upon motion or upon the final hearing, is not revived by the appeal. *Brevoort* v. *City of Detroit*, 24 Mich. 322. If complainant has just cause for apprehension, he can apply to this court after appeal for an injunction to preserve the *status quo*. *Hitchcock* v. *Wayne Circuit Judge*, 144 Mich. 362 (107 N. W. 1123). An injunction staying proceedings at law in a pending case does not affect the jurisdiction of the law court, nor affect the validity of the judgment therein obtained in disobedience of the injunction. *Geddis* v. *Wayne Circuit Judge*, 151 Mich. 122 (114 N. W. 874).

We are also of the opinion that the judge before whom both cases were tried, upon dismissing the bill of complaint and dissolving the injunction, may grant an order for the execution of the judgment in the suit at law; and, if such order is conditional, the appellant must comply with it, or rely upon such protection as is afforded by the statutory bond, which does not continue the protection afforded by the injunction previous to its dissolution. *Hovey* v. *McDonald*, 109 U. S. 150 (3 Sup. Ct. 136); *Knox County* v. *Harshman*, 132 U. S. 14 (10 Sup. Ct. 8); 2 High on Injunctions (3d Ed.), § 1709; *Wilkinson* v. *Dunkley-Williams Co.*, 141 Mich. 409 (104 N. W. 772).

The application for the writ of mandamus is denied.

MONTGOMERY, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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BOUCHA *v.* ALGER CIRCUIT JUDGE.

1. QUO WARRANTO—PLEADING—PETITION—PUBLIC OFFICERS.
   A petition for leave to file an information in the nature of a quo warranto against a township supervisor should be sufficiently clear and definite as to facts to make out a clear case of right, and should not state conclusions.
2. SAME—DISCRETION OF COURT.
   The granting or withholding leave to file an information in the nature of a quo warranto is discretionary.
3. SAME.
   The law requires a precise and positive showing before the appellate court will interfere in such proceeding.

Mandamus by Ezra J. Boucha to compel Joseph H. Steere, circuit judge of Alger county, to vacate an order denying a petition to file an information in quo warranto proceedings. Submitted December 14, 1909. (Calendar No. 23,637.) Writ denied February 3, 1910.

R. R. Stewart, for relator.

H. B. Freeman, for respondent.

BROOKE, J. At the April, 1909, election, relator was a candidate for the office of supervisor of the township of Munising, Alger county. His opponent for said office, at said election, one Marcus A. Doty, was declared elected. Relator thereupon filed his petition in the circuit court for Alger county, praying for leave to file an information in the nature of quo warranto against said Doty to test his title to said office. The circuit court denied relator's prayer. He now asks this court for a writ of mandamus, commanding the circuit judge to grant the prayer of his petition.

Relator's petition was in part as follows:

"He shows that there were eleven votes cast for your

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petitioner that were legal votes which were not counted by said election board for the alleged reason that said ballots contained distinguishing marks, when in fact said ballots did not contain distinguishing marks, the real reason being, that a majority of said election board were opposed to the election of your petitioner, and illegally refused to count said eleven ballots. He shows that said election board counted between one and ten ballots for said Marcus A. Doty that have distinguishing marks and were illegal ballots and should not have been counted."

We are of opinion that in holding that the relator, by his petition and affidavits in support thereof, failed to make a showing "sufficiently clear and definite as to facts, to make out a *prima facie* case" the learned circuit judge was clearly right.

It is apparent that relator swears to a conclusion only, and his affidavits are no stronger than his petition. The application should be so clear and positive in its statement of facts as to make out a clear case of right; and should be so framed as to sustain a charge of perjury if any material allegation is false. *Cain* v. *Brown*, 111 Mich. 657 (70 N. W. 337). The granting or withholding leave to file an information in the nature of a quo warranto is discretionary. *People* v. *Tisdale*, 1 Doug. (Mich.) 59; *Attorney General* v. *Railroad Co.*, 55 Mich. 15 (20 N. W. 696). The law requires a precise and positive showing before the court will interfere in such a proceeding. *Vrooman* v. *Michie*, 69 Mich. 42 (36 N. W. 749); *Cain* v. *Brown*, *supra*.

The writ is denied, with costs.

MONTGOMERY, C. J., and OSTRANDER and HOOKER, JJ., concurred with BROOKE, J. BLAIR, J., concurred in the result.

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ALLEN *v.* WAYNE CIRCUIT JUDGE.

1. INJUNCTION—PLEADING—EQUITY PRACTICE.
   Averments on information and belief in a bill to obtain an injunction do not justify the issuance of a preliminary writ.

2. SAME—ORDER TO SHOW CAUSE.
   Such averments are sufficient to obtain an order to show cause and would justify the temporary injunction if supported by proper evidence.

3. SAME—PARTIES—PRELIMINARY INJUNCTION.
   The omission of a necessary party to a suit for an injunction to restrain a municipality from constructing a fire department building on lots which were sold subject to a plan restricting buildings on the street to residences will not prevent the issuance of a temporary injunction.

4. SAME—MUNICIPAL CORPORATIONS — PUBLIC BUILDINGS — REAL PROPERTY—EMINENT DOMAIN.
   Such restrictions are binding upon a municipality as well as an individual, and the rights so obtained by adjoining purchasers must be acquired by purchase or condemnation before a lot subject to such restrictions may be used in violation of their terms.

5. SAME—MANDAMUS—SHOWING FOR TEMPORARY WRIT.
   Mandamus will not lie to compel the issuance of a temporary injunction on a bill sworn to on information and belief, unsupported by positive testimony.

Mandamus by Mark W. Allen and others to compel James O. Murfin, circuit judge of Wayne county, to vacate an order denying a writ of injunction. Submitted December 14, 1909. (Calendar No. 23,723.) Writ denied February 3, 1910.

Arthur J. Lacy and *Lucking, Emmons & Helfman*, for relators.

P. J. M. Hally, for respondent.

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HOOKER, J. The bill alleges or attempts to allege that one Hoyt Post, being the owner of 10 lots on Hurlbut avenue in the city of Detroit, announced and advertised the sale of said lots subject to a plan to make said avenue a residence street, with certain restrictions, and that thereby, and by certain valid contracts, which he made to persons who purchased in reliance upon said publication and plan, he subjected all of said lots to its restrictions. The complainants, who profess to be the owners of some of said lots, claiming the right to the performance of said contracts, filed the bill to restrain the city of Detroit from erecting a fire department building on certain of said lots, which the city had purchased or contracted for from Post. A temporary injunction was refused by the circuit judge, and we are asked to compel him by mandamus to allow such writ.

Inasmuch as no demurrer nor answer has been filed, and as the sufficiency of the allegations of the bill do not appear to have been questioned, we shall assume, but not decide, that it states a sufficient contract as against a private person and in favor of these complainants. As the same was based upon information and belief, it alone would not have justified the allowance of the writ. See *Manistique Lumbering Co.* v. *Lovejoy*, 55 Mich. 189 (20 N. W. 899); *Henderson* v. *Reynolds*, 11 L. R. A. (N. S.) 960 (168 Ind. 522, 81 N. E. 494), and cases cited. But on an order to show cause it was sufficient had it been supported by proper evidence. Again, the fact that Mr. Post was not made a party was unimportant, and should not have prevented the issue of the writ. If a necessary party, he could have been brought in later. Moreover, the bill may be amendable in both respects.

The respondent refused to hear proofs upon the further ground that a building restriction could not be enforced against a city, which sought in the exercise of its police power to erect and maintain for the public safety a fire department station on the property. We are satisfied that a valid building restriction may be binding upon a

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city as well as an individual, and, before it can use a lot charged with such restriction for a purpose prohibited by the restriction, it must obtain by purchase or condemnation, the title of all owners of any interest therein, and, when it has not done so, equity may properly intervene to preserve the *status quo* until such interests are acquired, provided the pleading and the evidence supporting the application show a reasonable probability of the validity and justice of complainants' claim. As the bill was verified on information and belief, and there was no proof taken, we cannot issue a mandamus to compel the allowance of an injunction. It will be without prejudice to another application, however, if counsel have confidence that they can allege and prove a valid contract binding upon and enforceable against the city in favor of the complainants, all of which questions will be open on such an application, though not necessarily determined finally thereon.

Writ denied.

MONTGOMERY, C. J., and OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

PRICE *v.* KENT CIRCUIT JUDGE.

MANDAMUS — HUSBAND AND WIFE—DIVISION OF PROPERTY — DIVORCE—APPEAL AND ERROR.

An order in divorce proceedings awarding to the wife possession of certain furniture will not be set aside in mandamus when it does not appear to be unjust and the legal right to the possession under the order is reviewable on appeal, as from a final order.

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Mandamus by W. Claude Price to compel Willis B. Perkins, circuit judge of Kent county, to vacate an order granting a temporary injunction. Submitted December 14, 1909. (Calendar No. 23,447.) Writ denied February 3, 1910.

Colin P. Campbell, for relator.

Dunham & Phelps, for respondent.

HOOKER, J. The relator's wife filed a bill for divorce against him, and while living in a house rented and furnished by him she obtained an order for the payment of $5 per week for the maintenance of herself and child. He was enjoined from selling the furniture. Subsequently the wife secured other apartments, and moved or attempted to move the furniture, some of which belonged to the husband, to such place. The court afterwards modified the injunction, and then the parties attempted to adjust the matter as to the furniture, but, failing in this, relator's solicitor prepared an order for the modification of the injunction, and secured the signature of the judge thereto. The brief for relator states that subsequently an order was made setting aside said former order and ordering substantially all of the furniture back into the hands of the wife, and relator asks that this order be set aside on the ground that the husband and not the wife "has the right to the possession of the personal property which has been used by himself and wife in and about their housekeeping operations after their separation." The last order made recites that the former order was made under a mistake of fact, and states that the furniture, being in a house rented by defendant (relator) prior to the separation, was removed to rooms afterwards rented by complainant, and that such furniture was necessary to her use; some of it being her own property. We are disinclined to interfere in this matter, as there is nothing to indicate that the order complained of is not just; and we may well deny the

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writ when it is not required to be issued in furtherance of justice.

Again, if the relator has an absolute legal right to the possession of this property, notwithstanding the provisions of 3 Comp. Laws, § 8686, which seem to authorize the courts to make such orders as that complained of, it would seem to be a final order, reviewable on appeal, as are orders giving receivers possession of individual property *pendente lite*, and therefore not to call for interference by mandamus. We have not overlooked the case of *Johnson* v. *Johnson*, 125 Mich. 671 (85 N. W. 94), which involved no order of the court of chancery.

The writ is denied, with costs.

MOORE, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

ALLEN *v.* PULFER.

FRAUD — OPINIONS — RESCISSION IN EQUITY — STOCK AND STOCKHOLDERS.

The defendants obtained an agreement from the complainants to exchange stock in a foreign corporation at par for the business of complainants, and after securing the contract doubled the capital stock of the defendant company, without making any additional payment or assessment, and without increasing the assets of the corporation. False representations were made as an inducement for the making of the exchange, to the effect that the defendants could make more money for the complainants, that the stock would pay six per cent. dividends, that the corporation could make large advances for the business, and that the business would improve; defendants also promised that the corporation would

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remove to Detroit and appoint complainants managers of departments. The promises were not performed. *Held*, that fraud was shown which would justify rescission in equity.

Appeal from Wayne; Mandell, J. Submitted December 15, 1909. (Docket No. 135.) Decided February 3, 1910.

Bill by Eugene D. Allen and others against George B. Pulfer and Mentor Wetzstein, individually and as trustees, the Ideal Concrete Machinery Company, and the Architectural Mold Company to set aside certain articles of incorporation on the ground of fraud. From a decree for complainants, defendants, except the Architectural Mold Company, appeal. Affirmed.

Orla B. Taylor and *Charles F. Delbridge*, for complainants.

Graves, Hatch & Wasey, for appellants.

OSTRANDER, J. The record presents questions of fact only. It would profit no one to set out the testimony. What was actually accomplished through the dealings of the parties was this: Complainants, who were copartners in a small but growing business, were induced by defendants, or by some of them, to incorporate under Michigan laws and to assign the stock of the corporation to trustees for the defendant Ideal Concrete Machinery Company, an Indiana corporation. The inventoried value of the property of the corporation so organized was $4,133.37. The stock was exchanged for $4,000 par value of the stock of the above-named corporation, which was capitalized at $200,000 and the capital of which had been increased a few days before the exchange referred to, and after negotiations were begun, from $100,000, without the contribution of any money from any source and without the addition of anything of value to its assets, unless it was a reissue patent and other patents. The contract of the parties

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is in writing and dated February 12, 1907. The monthly statement of the Ideal Concrete Machinery Company for December, 1906, the last one before the capital stock was doubled, showed assets of $114,043.59, of which $22,197.28 was notes receivable and $21,773.12 patents. Total liabilities, including capital stock, were $131,351.78. The notes treated as assets included notes of defendant Pulfer for $11,500, with stock of the company as security, and note of one Smith for $10,000, given for treasury stock, which stock was held as security. Liabilities included accounts payable $8,262.78, notes payable $20,000, personal accounts $3,089. The statement of the company for January, 1907, showed assets of $208,265.15, and liabilities including $200,000 capital stock, of $230,848.50. The assets were increased by valuing patents at $121,773.12, which it will be seen was an increase over the valuation of the prior month of $100,000. Various representations were made to complainants by the defendant Pulfer to bring about the transfer of complainants' property, first, to a corporation, and then to the defendant Ideal Concrete Machinery Company, which must be regarded as statements of fact and not of opinion, although, if the dealings had been between persons of equal or nearly equal intelligence in such matters, they might be regarded as expressions of opinion merely. The reason for this is well expressed in the opinion of the trial judge, who found and said:

"Prior to entering into this deal, none of the complainants had had the advantage of a business education. They were unlearned and unskilled in business, and particularly in corporate ways. No explanation can be given for the deal that they actually entered into, unless upon the theory that they expected and were led to believe they would get some advantage out of it, not contained in the papers they signed, for by the deal they gave up their business, all proprietorship therein, and reduced themselves to the condition of mere employés, who could be discharged at will, with or without reason, and they were bound by the terms of their contract not to engage in any similar business for themselves for the period of three

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years from the date of the contract. What did they get in return? The privilege of working for about mechanics' wages in Detroit for an Indiana corporation, and each received $1,000 worth par value of the stock in such corporation. If they understood the contract, and if there was nothing more to the contract than appears in the written paper, then most assuredly there can be no doubt that the bargain was a very one-sided one, for the physical property they gave up was clearly worth $4,000, to say nothing of the patent which it was claimed was worth, and appears to be worth, $1,000 additional, for $4,000 par value of stock which was then of doubtful value. When the papers were examined by an attorney of standing in this community, he stated to them that the papers were properly drawn, but that their interests were not taken care of therein. One of the complainants stated in the presence of at least one of the defendants that the complainants depended upon the good faith of the defendants, and that their protection was in the confidence they had in the defendants. This confidence was born undoubtedly out of certain statements and assurances of the defendants. The evidence clearly shows that the negotiations lasted some little time, and that several interviews were had between one or more of defendants and the complainants, and that in these interviews the complainants were assured by the defendants that they, the complainants, were not making enough money, and that the defendants could make more money for them; that it was to the complainants' advantage to make the deal; that the defendants could advance lots of money to get out forms, etc. They were assured that 'your business will improve.' They were also informed that the business of the Ideal Concrete Machinery Company would be moved to Detroit, and gradually enlarged, and that the stock of that company would net a return of 6 per cent., and that each of complainants would be appointed head of a department. It is claimed by the defendants that these very statements made by them were made in good faith, and that no charge of fraud can be predicated on them, because they were merely executory promises, but in view of the peculiar nature of the contract, and the character of what the complainants were giving, and what they were actually receiving, under the terms of the contract, I am convinced that these various statements should be construed into statements of conditions actually existing, that

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justified the conclusions drawn by the defendants and assurances given to the complainants."

The promises made to complainants have not been kept. That complainants were in fact deceived cannot be doubted. I am satisfied from the testimony that deceit—actual inducing of beliefs, based upon speculative statements accepted by complainants as true, affecting and intended to affect the action of complainants to their detriment and to the advantage of defendants—was practiced, and was intended to be practiced.

The decree requires the holders of the stock of the Architectural Mold Company to return it to complainants, and requires the complainants to return the shares they received in the Ideal Concrete Machinery Company. We are all agreed that the decree should be affirmed.

MONTGOMERY, C. J., and HOOKER, MOORE, and MCALVAY, JJ., concurred.

ZOLTOVSKI *v.* GZELLA.

1. NEGLIGENCE—AUTOMOBILES— MOTOR VEHICLES — EVIDENCE OF EXCESSIVE SPEED.

   That an automobile was exceeding the speed limit or was running at an excessive rate is not shown by testimony that it was running a good deal faster than a horse trots, and went pretty fast.

2. SAME—LIGHTS—STATUTES.

   Absence of lights on an automobile in violation of Act No. 196, Pub. Acts 1905, as amended by Act No. 804, Pub. Acts 1907, constitutes negligence.

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8. SAME—CONTRIBUTORY NEGLIGENCE—INFANTS—PEDESTRIANS.
A child of 13 years who runs across a public street without looking for any vehicle which might be coming, is guilty of contributory negligence precluding recovery for injuries received by being run down by an automobile.

Error to Wayne; Mandell, J. Submitted December 15, 1909. (Docket No. 46.) Decided February 3, 1910.

Case by Paul Zoltovski, by next friend, against Francis Gzella for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Sloman & Sloman, for appellant.

Brennan, Donnelly & Van De Mark, for appellee.

HOOKER, J. The plaintiff is a boy 13 years old. He was playing tag in a public street, and, having tagged a companion, started to run across the street pursued by the older boy. As he crossed, he ran into or was struck by an automobile driven by the defendant. There was testimony tending to show that the car struck him. If so, it is clearly demonstrable that he ran directly in front of the car, and was struck, while his companion saw the car, and stopped before getting in the way of danger. The accident happened about 30 feet from the intersection of two streets, at a place well lighted by an arc and other lights. There is evidence tending to show that there were no lights on the machine. After the boy was struck, the machine ran but little more than its length. Only one witness, a woman, testified to the speed of the machine. She said it ran "a good deal faster than a horse trots. It went pretty fast." The negligence claimed is (1) excessive speed; (2) absence of lights on the car. The learned circuit judge held that the testimony would not justify the finding of excessive speed, either as exceeding the statutory limit or as unreasonable, and that the absence of lights on the machine did not contribute to the injury,

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because the boy did not look toward the automobile. He also found that the plaintiff was guilty of contributory negligence, in that he ran immediately in front of the machine, and he directed a verdict for the defendant, and plaintiff has appealed.

We are of the opinion that excessive speed was not proved; *i. e.*, that it does not appear that the statutory limit was exceeded, nor is there testimony which shows an unreasonable speed. We think, however, that proof of an absence of lights on the car was testimony tending to prove negligence under our decisions, in view of the statutory requirements.

The evidence indicates that the boy was careless in not seeing the car. If, as the learned circuit judge said in his charge, the boy testified in answer to a question that was asked him that he did not look but was intent on his play, it would establish his contributory negligence. This proof is not to be found in the record, but it does not appear that all of the testimony is in the record, and we must take the statement of the circuit judge as true. But aside from that, all of the testimony shows that the plaintiff carelessly ran immediately in front of the machine. The boy who was chasing said:

"I did not see the automobile only just as it struck Paul. That is all I can say. I know that I had been standing on the side of the street, and all at once Paul tagged me and scooted across the street as fast as he could because I was after him, and I intended to catch him. I wanted to make him 'It.'

"*Q.* And just the instant he got out in the road the automobile was there, too?

"*A.* Yes, sir.

"*Q.* It stopped instantly?

"*A.* Yes, sir.

"*Q.* It didn't run three feet?

"*A.* No; it didn't run nothing at all. As soon as it run over him, he stopped."

The boy and the machine reached the same point in the highway at the same instant. Neither boy saw the ma-

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chine, but the one behind the plaintiff had his attention called to it by its striking the plaintiff, who was just far enough in advance of him to get hit.

The only question is one of law. Was it contributory negligence in a 13 year old boy to become so engrossed in play as to run across a city street and immediately in front of an approaching automobile without thought to look to see whether such a machine or any other vehicle was approaching? In *Henderson* v. *Railway*, 116 Mich. 368 (74 N. W. 525), an eight year old boy ran into the front end of a street car. In that case his view was more or less obstructed by a coal wagon or another car going in a direction opposite to that of the car that he ran into, and which wagon or car he ran behind in his approach to the track. Mr. Justice MONTGOMERY said:

"It was but common prudence in crossing such a thoroughfare to look, not only for the car, but for any vehicle which might be coming. Injury would have occurred from collison with an ordinary wagon just as surely as from running into this car, and from the testimony of the lad himself he had intelligence enough at the time to know this. Why, then, should it be left for the jury to say that he had not?"

See, also, *Ecliff* v. *Railway Co.*, 64 Mich. 203 (31 N. W. 180).

While the injury to this child necessarily arouses the sympathy of all observers, it does not warrant the imposition of damages upon one who is not shown to have been blamable in the premises. A verdict in this case would be, as the judge well said, a bestowal by the jury of "charity from another man's pocket."

The judgment is affirmed.

MONTGOMERY, C. J., and OSTRANDER, MOORE, and MCALVAY, JJ., concurred.

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DELOR *v.* DELOR.

1. DIVORCE—EXTREME CRUELTY.
   Calling his wife vile names, accusing her of theft and of infidelity constitute extreme cruelty on the part of the husband.

2. SAME—PRACTICE.
   Testimony received and considered in a suit for divorce taken upon a reference to a commissioner by the court of its own motion, works no prejudice to an appellant where the point which it tends to sustain is decided by the court in appellant's favor.

3. SAME—ALIMONY—ESTATES BY THE ENTIRETIES.
   The interest of a wife in an estate by the entireties cannot be diminished by a decree for divorce.

4. SAME—AMOUNT OF ALIMONY.
   An allowance to the wife of $3,800 in lieu of her interest in certain real property held by the entireties and valued at $7,000 is not excessive.

Appeal from Wayne; Donovan, J. Submitted December 15, 1909. (Docket No. 154.) Decided February 3, 1910.

Bill by Barbara Delor against Joseph Delor for a divorce. From a decree for complainant, defendant appeals. Affirmed.

Thomas Hislop, for complainant.

Charles S. Hampton, for defendant.

MOORE, J. The complainant filed her bill of complaint, alleging cruelty and asking a legal separation, which bill was amended by consent so as to ask for an absolute divorce. The defendant filed an answer in the nature of a cross-bill asking for a divorce. Complainant filed a replication, also answered to the cross-bill. A decree was

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granted complainant for divorce and for alimony. The case is brought here by appeal.

The case did not take the usual course, but after it was partly heard in open court it was referred to a commissioner. A consideration of the questions raised by the solicitor for the appellant will be simplified by calling attention to some of the things which occurred upon the trial.

The trial progressed for a time, when the following occurred:

"*The Court:* I take it the contest is divorce, or no divorce, mainly?

"*Mr. Hampton:* Principally, I presume, the matter of property. The bill of the complainant is for separate maintenance, but the defendant files a bill in the nature of a cross-bill asking for divorce. The complainant asks for separate maintenance, and the defendant asks for a divorce. The principal matter of contest will be the property."

After a number of witnesses had been sworn, a colloquy occurred between court and counsel, in which the court suggested a limitation of the number of witnesses. Counsel said:

"*Mr. Hampton:* I readily appreciate what the court suggests and think it is better to adopt it, for my client will take the stand and swear he will not live with this woman any longer. I will say, second, if this accusation that this woman has made in her pleadings and in testimony so far as she was permitted to—if that accusation is true—the woman should have her decree, or anything she asks for, and it is simply a question of the division of the property. If that accusation is not true, no white man would live with the woman who would so charge, and the man should have the decree. I am willing to brush aside all the other matters, and come directly to that one, and I think the court is right in suggesting a limitation to this."

Later the question of amendment to complainant's bill arose when the following occurred:

"(After a brief recess.)

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"*The Court:* You may amend your bill.

"*Mr. Hislop* (to Mr. Hampton): As I understand it, you consent to that amendment?

"*Mr. Hampton:* It is asked that the prayer of the bill be so amended as to ask for a divorce, instead of separate maintenance, and I have no objection to that."

After the question of whether defendant was afflicted with the disease referred to in her bill of complaint was raised, and some testimony given in relation thereto, a colloquy arose as follows:

"*The Court:* I am not judging the case upon that ground at all. If you are determined to go on with it that way, it will take probably more than the day.

"*Mr. Hampton:* The time of this court cannot be better used than in clearing a man's character.

"*The Court:* You may take all the time you want to. I will refer this case to Commissioner Samuel May for the balance of the hearing upon this testimony. I deem the case one that should not be heard in a public court room.

"*Mr. Hampton:* Shall we take testimony upon this one charge?

"*The Court:* That is all I care for.

"*Mr. Hislop:* Your honor has imposed a burden upon the complainant, which she is absolutely unable to bear. She cannot bring in that testimony and present it to this court.

"*The Court:* She does not need to bring in the testimony except upon that one charge.

"*Mr. Hislop:* I have not the money, and she has not the money.

"*The Court:* There are only two doctors; how many physicians have you?

"*Mr. Hislop:* I guess a couple.

"*The Court:* You have two. It is referred to Mr. May. I wish you would go down and make your arrangements as to time with him.

"*Mr. Hislop:* Will your honor make an order for an allowance to be made for the production of the testimony?

"*The Court:* Yes, upon that one point, I wish you would go down and make your terms with him.

"*Mr. Hislop:* We do not know where we are.

"*The Court:* It is confined to doctors.

"*Mr. Hislop:* I never could be confined to that; all the hearing that this case will ever have must be now.

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"*The Court:* All the hearing that this case will ever have before me is referred.

"*Mr. Hislop:* So that we cannot put in our case.

"*Mr. Hampton:* We do not want to go before the commissioner, and pay for all of these witnesses. When I state upon that one point I will rest my case, I think you ought to adhere to the ruling made.

"*The Court:* I shall keep my word."

Testimony was taken before the commissioner. The complainant took testimony before the commissioner other than the testimony of the two doctors. When the testimony was presented to the trial judge, objection was made to his considering any of it.

It is evident, from a reading of the record, that defendant was seeking two things: *First*, to avoid having the charge established as set out in the complainant's bill of complaint that he had a venereal disease; and, *second*, to keep the amount of alimony as low as possible. The decree was to the effect that the acts of cruelty charged in the bill of complaint were true, except the allegation that defendant had a venereal disease. If all that occurred before the commissioner was eliminated by the trial judge, there was abundance of proof of extreme cruelty on the part of defendant to sustain the decree. It was shown that defendant had called complainant many vile names. He accused her of being a thief, and had charged her with infidelity to her marriage vows. It is apparent that, if the trial judge considered the testimony at all which was taken before the commissioner, it did not harm the appellant, for the reason that the judge found that complainant did not establish the charge to which appellant objected, and to meet which charge the testimony of the doctors was taken. It is also clear from the record that no injustice has been done defendant in sustaining the charge of extreme cruelty other than the one of having a venereal disease.

This brings us to the question of alimony. The decree gave to complainant as alimony the household furniture, $110 as costs, and $3,800, and required complainant to re-

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lease her interest in the real estate. It also gave the complainant the option to take over the real estate upon the payment of $3,000. This option she declined to exercise. The real estate is owned by the parties by the entireties. It is appellant's claim that the allowance of alimony is too large, that there should be deducted from the value of the real estate the sum of $1,500 contributed towards its purchase of property which came to the appellant from the Delor estate. There are two answers to this contention: *First*, it is not made clear from what sources the money came which was the consideration for the real estate; and, *second* and conclusively, that the real estate is owned by the entireties, and it is not competent for the court in fixing alimony to diminish the estate owned by the wife in the realty in this proceeding. See *Brown* v. *Brown*, 144 Mich. 654 (108 N. W. 288). There is no serious controversy about the real estate being worth $7,000, making the interest of the complainant therein $3,500. The appellant is allowed to keep his grocery stock. The allowance of $300 alimony in excess of the value of complainant's interest in the real estate is not an excessive allowance in a proceeding of this kind.

The decree is affirmed, with costs.

MONTGOMERY, C. J., and OSTRANDER, HOOKER, and MCALVAY, JJ., concurred.

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In re BOLDEN.

1. CRIMINAL LAW—SENTENCE.
   A respondent convicted of lewd and lascivious cohabitation within 3 Comp. Laws, § 11693, providing for imprisonment in the county jail for not more than one year, or a fine not exceeding $500, is not subject to 3 Comp. Laws, § 11785, imposing an additional term of imprisonment in the State prison for subsequent offenses in the case of persons duly sentenced to one year or more therein.

2. SAME—HABEAS CORPUS—DISCHARGE.
   A prisoner sentenced to two and one-half years in the State prison under such statutes is entitled to release on habeas corpus.

Habeas corpus proceedings by John Bolden to procure his discharge from the State prison at Jackson. Submitted December 30, 1909. (Calendar No. 23,799.) Petitioner discharged February 3, 1910.

John Bolden, in pro. per.

John E. Bird, Attorney General, and *George S. Law*, Assistant Attorney General, for respondent Warden.

MOORE, J. The petitioner was convicted of violating the following statute:

"If any man and woman, not being married to each other, shall lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, shall be guilty of open and gross lewdness and lascivious behavior, or shall designedly make open and indecent or obscene exposure of his or her person, or of the person of another, every such person shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding five hundred dollars." Section 11693, 3 Comp. Laws.

He was also indicted under section 11785, 3 Comp. Laws, which reads:

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"When any person shall be convicted of any offense, and shall be duly sentenced therefor to confinement in the State prison of this State, for one year or more, and it shall be alleged in the indictment on which such conviction is had, and admitted or proved on the trial, that the convict has before been sentenced to a like punishment by any court in this State, or in any other of the United States, for a period not less than one year, he shall be sentenced to be punished by imprisonment in the State prison not more than seven years in addition to the punishment prescribed by law for the offense of which he shall then be convicted."

The petitioner was on the 30th day of September, 1905, sentenced to be confined in the State prison at Jackson, for a period of not less than two years and six months, and not more than eight years from and including the 30th day of September, 1905, where he has since been and now is confined. This is a proceeding by habeas corpus to determine the validity of the sentence imposed upon the petitioner. The petitioner claims that for the offense which he committed and was convicted he could not be sentenced for any period to the State prison. The statute which provides in what cases persons may be sentenced to the State prison is section 2108, 1 Comp. Laws, and is as follows:

"Courts of criminal jurisdiction may sentence to the State house of correction and reformatory at Ionia all male persons over fifteen years of age and not known to have been previously sentenced to a prison for felony, who shall be convicted of any crime except treason or murder in the first degree; and all male persons over fifteen years of age who shall be convicted of any misdemeanor, where the sentence for such crime or misdemeanor shall not be less than six months; and may sentence to the State prison at Jackson any person over the age of fifteen years, duly convicted of any crime punishable by imprisonment in said State prison, as the courts shall deem best; and may sentence to the State house of correction and branch of the State prison in the Upper Peninsula all persons convicted as is or may be provided by law for sentencing prisoners to any of the other prisons in this State, as the court shall in its discretion deem best."

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These provisions do not authorize a sentence to the State prison at Jackson of one convicted of an offense against the provisions of section 11693, 3 Comp. Laws. *In re Allen*, 139 Mich. 712 (103 N. W. 209). In this case it was held:

"That on conviction of lewd and lascivious cohabitation (section 11693), an offense for which the imprisonment provided is, 'imprisonment in the county jail not more than one year or fine not exceeding five hundred dollars,' the offender may be sentenced to the State house of correction at Ionia, or to the branch prison at Marquette, but not to the State prison at Jackson."

On the part of the people it is said:

"The Michigan reformatory is clearly a State prison within the meaning of this statute. It is governed by the general revision of the laws applicable to the Michigan State prison at Jackson, the Upper Peninsula prison at Marquette, and the Michigan reformatory. If the court in this case had imposed a sentence of one year to the Michigan reformatory, or to the Upper Peninsula prison, upon conviction of the offense of indecent exposure, it is clear that the court would have had authority under this section to impose an additional sentence of not more than seven years by reason of the previous conviction for the same offense."

It is also said that petitioner should not be discharged, but should be remanded for a legal sentence under *People* v. *Farrell*, 146 Mich. 264 (109 N. W. 440), and *In re Vitali*, 153 Mich. 514 (116 N. W. 1066, 126 Am. St. Rep. 535). The trouble with this contention is that the additional sentence authorized by section 11785, 3 Comp. Laws, may be imposed only in cases where one shall be duly sentenced in the State prison of this State, for one year or more, while in this case the sentence for the original offense must be not more than one year, and could not be in the State prison at all. It follows the petitioner must be discharged.

It is so ordered.

MONTGOMERY, C. J., and MCALVAY, BROOKE, and BLAIR, JJ., concurred.

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BENHAM *v.* FERRIS.

BROKERS—COMPENSATION—PRINCIPAL AND AGENT.

No liability is shown to a plaintiff for negotiating a sale of defendant's lands, under testimony that the defendant offered a third person all he might obtain above a specified sum if he should obtain a purchaser, and the third person, without authority, arranged with plaintiff to find a buyer; the defendant not being shown to have given authority to employ plaintiff, or to have known that the latter was acting as his agent.

Error to Barry; Smith, J. Submitted January 5, 1910. (Docket No. 6.) Decided February 3, 1910.

Assumpsit by Charles B. Benham against Alonzo Ferris for commissions on the sale of real estate. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

Thomas Sullivan, for appellant.

Colgrove & Potter, for appellee.

Plaintiff sued defendant, a nonresident of the county, in justice's court, employing the writs of attachment and of garnishment. As appears by the return of the justice of the peace:

"The plaintiff declared on the common counts in assumpsit, and especially on a contract whereby defendant agreed to give the plaintiff a certain sum of money in case plaintiff found a purchaser for defendant's farm."

Defendant did not appear, and judgment for the plaintiff was rendered. On appeal to the circuit court various objections were made to the pleading in justice's court, to the admission of testimony, to the charge of the court, and to refusals of the court to charge as requested by defendant. A jury returned a verdict for plaintiff, and

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judgment followed. A new trial was asked for, and was refused.

OSTRANDER, J. (*after stating the facts*). We shall consider but one of the numerous assignments of error, which is the refusal of the court to charge the jury that:

"Under the undisputed evidence in this case there was no such contract of agency proven and established by the plaintiff that will bind the defendant, Mr. Ferris, to the payment of a commission to the plaintiff, and the plaintiff cannot therefore recover under the proofs in this case."

It is not claimed that defendant ever made any agreement with plaintiff to sell his lands, or ever saw or communicated with plaintiff. The claim of plaintiff is stated in the brief in this way:

"It is our claim in the case at bar that there was sufficient testimony as to defendant Ferris' knowledge of Mingus' dealings and transactions with Benham, and of his ratification of such transactions, to justify the jury in finding that Mingus was in fact the agent of Ferris, with full authority to make the contract on Ferris' behalf with Benham; and, if they so found, they had a perfect right to consider the statements of Mingus, as testified to by Benham, as being part of the transaction, of the benefits of which Ferris availed himself with full knowledge of the facts, which constituted a ratification on his part."

There is testimony tending to prove an agreement between defendant and one Mingus, that if Mingus would sell defendant's farm, he might have all he could get more than $1,800. There is testimony tending to prove that Mingus availed himself of the services of plaintiff upon an arrangement made between them. There is testimony tending to prove that plaintiff brought about a sale of the land in two parcels for more than $1,800, and that defendant accepted from Mingus the sum of $1,800, and conveyed the land; the plaintiff being named as vendee in one of the deeds. We have discovered, and have been referred by counsel for appellee to, no testimony tending to prove any authority of Mingus to employ plaintiff on

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defendant's account, or to make for defendant any arrangement with plaintiff, and none tending to prove that defendant ever supposed that plaintiff was claiming to act as his agent, or was assuming so to do. The jury should so have been instructed.

Judgment is reversed, and a new trial ordered.

MONTGOMERY, C. J., and BROOKE, BLAIR, and STONE, JJ., concurred.

COELING *v.* BARNARD.

1. APPEAL AND ERROR—BOND — MOTION TO FILE AFTER WRIT OF ERROR.

   After return is made to a writ of error the Supreme Court has exclusive jurisdiction to entertain a motion to file an appeal bond *nunc pro tunc* to stay proceedings on execution.

2. SAME—APPEAL BOND—AMENDMENT.

   Appellate courts have power as an incident to their appellate character, on application, to amend an original appeal bond or require a new one.

3. SAME—SHOWING.

   The affidavit of plaintiff's attorney, uncontradicted, that the appellant omitted to file the statutory appeal bond because he intended to pay the judgment for costs awarded against him, but had later discovered the defendant was irresponsible and that he could not recover them if he prevailed on error, is sufficient to warrant the court in granting the application.

Replevin by Tite Coeling against Edward N. Barnard and another: On motion of plaintiff for leave to file a bond to stay proceedings pending an appeal to the Su-

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preme Court. Submitted January 11, 1910. (Calendar No. 23,741.) Motion granted February 3, 1910.

Smedley, Hall & Freeland, for the motion.

Maher & Barnard, contra.

BROOKE, J. Appellant was plaintiff in a replevin case at circuit, where a verdict was directed against him on November 2, 1909, with costs to be taxed. Said costs were afterwards taxed at the sum of $25.

Appellant caused a bill of exceptions to be settled and filed within the 20 days allowed by the statute. On November 26, 1909, he caused a writ of error to issue out of this court which has been returned, and the case is now pending here. He did not file the statutory bond to stay proceedings pending appeal, and defendant has caused execution to issue against him for the taxed costs. Appellant, by one of his attorneys, now applies to this court for leave to file the statutory bond *nunc pro tunc* to stay proceedings, averring in his petition that, when the appeal was perfected, it was his intention to pay the taxed costs, but that the petitioner had learned, about December 1st, that the defendant was financially irresponsible, so that if a reversal should follow in this court, he would be unable to recover back the money so paid. After return is made to the writ of error, this court is the only one possessing jurisdiction to entertain such an application. *Worden* v. *Manistee Circuit Judge*, 33 Mich. 111.

Appellate courts have power as incident to their appellate character, on application, to amend the original bond or require a new one. *Pulte* v. *Wayne Circuit Judge*, 47 Mich. 646; *Bock* v. *Grocery Co.*, 100 Minn. 71 (110 N. W. 257, 9 L. R. A. [N. S.] 1054); *American Brewing Co.* v. *Talbot*, 135 Mo. 170 (36 S. W. 657). That power is broad enough to cover a case like the present, where it is sought to file an original instead of an amended or new bond.

Defendant objects to the allowance of the order upon

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the ground, among others, that the petition is made by the attorney for appellant, instead of by appellant himself. We notice that defendant has filed no affidavit denying the averments of the petition; they may therefore be presumed to be true.

The order will be made as prayed, but with costs of motion to appellees.

MONTGOMERY, C. J., and OSTRANDER, BLAIR, and STONE, JJ., concurred.

FRANKLIN LIFE INSURANCE CO. *v.* COMMISSIONER OF INSURANCE.

FEDERAL LIFE INSURANCE CO. *v.* SAME.

UNITED STATES ANNUITY & LIFE INSURANCE CO. *v.* SAME.

INSURANCE—FORM OF POLICY—STATUTES.

The commissioner of insurance will not be required by mandamus to approve insurance policies of the relators which include a clause that if any premium, note or portion thereof is not paid when due the policy shall be void, the provision being a material change from the requirements of Act No. 187, Pub. Acts 1907, as to the payment of the first premium in advance, and subsequent premiums within thirty days.

Mandamus by the Franklin Life Insurance Company, the Federal Life Insurance Company, and the United States Annuity & Life Insurance Company to compel James V. Barry, commissioner of insurance, to vacate an order disapproving certain policy forms. Submitted Jan-

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uary 4, 1910. (Calendar Nos. 23,678, 23,679, 23,680.) Writ denied February 3, 1910.

McAnulty & Allen, *C. A. Atkinson*, and *Lucius McAdam* (*Thomas, Cummins & Nichols*, of counsel), for relators.

John E. Bird, Attorney General (*Arthur P. Hicks*, of counsel), for respondent.

BLAIR, J. In the above-entitled cases respondent, acting under the authority conferred upon him by section 4, Act No. 187, Pub. Acts 1907, disapproved of certain policy forms filed with him by relators, who seek the writ of mandamus to compel respondent to withdraw his disapproval of such forms.

The ground upon which the commissioner disapproved of the policy forms was that the provision therein, "If any premium is not paid when due or if any note or part thereof is not paid when due, this policy shall be *ipso facto* null and void, and all premiums forfeited to the company, except as herein provided," was in conflict with the first and second subdivisions of section 1 of the act, providing for payment of premiums in advance and for one month's grace for such payments after the first year. It is conceded by respondent that prior to the passage of the act in question a policy containing the provisions under consideration would have been unobjectionable, and that the courts have so held. Relators contend that the insertion in the policy by the command of the statute of the requirement of payment in advance, which was voluntarily included in the policies by universal custom previously, does not operate to render illegal the use of a note clause theretofore legal; that there is no express prohibition of the note clause in the statute and the court has no authority to supply such prohibition; that the provisions of the note clause are beneficial to the company and it may waive such benefits.

As we have heretofore held, "the requirement that cer-

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tain provisions shall be and certain others shall not be incorporated in the policy requires us to say that no provisions should be inserted which have the effect of avoiding or nullifying the required provisions," and "no provision may rightfully be used which shall, with or without action of the policy holder, materially change or avoid the statute scheme of the contract." *Mutual Benefit Life Ins. Co.* v. *Commissioner of Insurance*, 151 Mich. 610 (115 N. W. 707). Prior to the enactment of the statute, it was optional with the parties what provisions the contract should contain upon the subject of payment. Since the passage of the act it has ceased to be optional with the parties, and authorities construing the contract independent of the statute are not conclusive. The provision, "all premiums shall be payable in advance," etc., is mandatory in form and in spirit, except as the next subdivision, providing for a month's grace after the first year expands its application, and, taken together, they require that payment of the first premium must be strictly in advance and of subsequent payments within 30 days. We are of the opinion that, as contended by respondent, the note clauses of the policy forms in question are inconsistent with the statutory requirement of payment in advance and materially change the scheme of the contract as outlined by the statutory requirements and prohibitions.

The question of waiver has no application to the case. The respondent's inquiry is limited to a consideration of the question whether the policy forms submitted are in compliance with the statute.

We think that respondent's rulings were correct, and the application for the writ is denied.

MONTGOMERY, C. J., and OSTRANDER, HOOKER, and STONE, JJ., concurred.

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KLOTZ v. LENAWEE CIRCUIT JUDGE.

APPEAL AND ERROR — EXTENSION OF TIME TO FILE CLAIM OF APPEAL—EQUITY PRACTICE—MANDAMUS.

It is not an abuse of discretion unwarranted by Act No. 340, Pub. Acts 1907, for the circuit judge to extend the time for filing a claim of appeal in chancery, in behalf of a defendant whose attorney through an error omitted for seven months to file and serve the notice, although he prepared the record from the minutes obtained from the court stenographer and otherwise perfected the appeal in time.

Mandamus by Effie Klotz to compel John L. O'Mealey, circuit judge of Lenawee county, to vacate an order extending the time to take an appeal. Submitted January 4, 1910. (Calendar No. 23,672.) Writ denied February 3, 1910.

Smith, Baldwin & Alexander, for relator.

Theodore M. Joslin, for respondent.

STONE, J. This is a petition for mandamus to compel the respondent to set aside an order made on August 23, 1909, extending the time for filing notice of appeal and settling the testimony in a chancery case that had been disposed of by a decree of said court.

The petition for mandamus states that the decree was made and filed October 22, 1908, but the return of the respondent gives the date of the decree as December 15, 1908. The order complained of was based on the affidavit of Theodore M. Joslin, which stated that he was the solicitor for the defendants in the said chancery cause, and that after the announcement of the finding of the court in said cause, and before the preparation and filing of the decree in said cause, deponent announced to the solicitor for complainant in said cause that he intended to

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take an appeal, and immediately following the filing of the decree he prepared a notice of appeal, and also ordered a transcript of the testimony in said cause from the stenographer of said court, but by mistake the said notice of appeal was not filed until the month of July, 1909, and that deponent believed that the notice of the claim of the appeal had been served upon the complainant's solicitor, until that time. He further says that within 40 days after the filing of the decree he had procured a transcript of the testimony in said cause and had met Henry C. Smith, one of complainant's solicitors, on a Toledo & Western car *en route* to Toledo, and had then shown said transcript to said Smith, and had talked with him in reference to preparing an appeal. That deponent used reasonable diligence in preparing said appeal, and that he had prepared the same and submitted it to complainant's solicitors; that the same constitutes over 125 pages of typewritten matter; and that the failure to serve notice of appeal within the statutory time was due entirely to a mistake, and the belief that the same had been served; that large expense had thus been incurred in securing a transcript of the testimony and settling on appeal; and that such defendants would be deprived of their just rights if prevented from taking an appeal, and that said appeal would be prepared within the next 30 days; and that there had been no delay or laches on the part of defendants, and the only reason for the failure to file said claim of appeal in time was simply due to a mistake in not serving after the same had been prepared. This affidavit was sworn to on the 13th day of July, 1909. Motion was made and notice of hearing thereof served, and on August 23, 1909, the respondent, after reciting the appearance of the solicitors for the respective parties before him, ordered as follows:

"After hearing and considering the allegations of the parties, and the argument of counsel, and being fully advised in the premises, it is found that the said defendant's solicitor prepared said claim of appeal within the time

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provided by statute, and ordered a transcript, and prepared the testimony from the same in good faith and for the purpose of procuring a review of the same in the Supreme Court, to be settled by the court, and only learned that said claim of appeal had not been filed and served when the service of transcript and proposed testimony was served upon the solicitors for the opposite party, and it is ordered that said motion be, and the same is hereby granted, and that sixty days from this date be allowed to settle the testimony in said cause."

Thereafter the solicitors for the relator and for the complainant in said chancery cause filed a motion to vacate said order of August 23d upon the grounds:

"(1) That said proposed decree was not submitted to solicitors for complainant and they had no opportunity to examine the same, and the same contains findings of fact which there was no evidence to sustain.

"(2) That there was no legal showing to move the discretion of the court to grant such order."

The only showing was the affidavit of the solicitor for the defendants, simply showing that he omitted to file and serve the notice of appeal. His omission was simply due to a mistake in not serving; that the same had been prepared.

"(3) That the court did not exercise a legal discretion in granting the motion without a proper showing of facts sufficient to base the same upon.

"(4) Because the motion for the order was not made by defendants, the showing was not made by them."

There was no showing that they, or any of them, had been misled by any act, mistake, or failure of their solicitor.

"(5) Because under the statute the court had no authority to extend the time."

This motion came on to be heard before respondent on the 13th day of September, 1909, and was denied. The reasons for the writ of mandamus, as stated in the petition, are substantially the same as those in the motion which we have just referred to. The respondent returns

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that he had no knowledge as to whether the proposed order or decree was submitted to the relator's solicitor, except that he had reasons to believe, and did believe, the statement of defendants' solicitor, Theodore M. Joslin, that he had submitted the same to relator's solicitor, Henry C. Smith. That respondent inserted in said order, when submitted to him, the words "that the action of defendant's solicitor in the chancery cause had been in good faith, and for the purpose of procuring a review of the case in the Supreme Court;" and that he also inserted in said order the words "that said solicitor had only learned that said claim of appeal had not been filed or served when said transcript of testimony had been served upon the opposite party." The respondent further returns that he held and determined from the affidavit of the said Joslin that he, the said Joslin, had, within the 40 days after decree, prepared a claim of appeal and had ordered a transcript of the testimony for the purpose of reviewing said cause in the Supreme Court. That this was done in good faith, and that the failure to serve the same was in view of the fact that defendants' solicitor believed that the same had been served, and therefore prepared the proposed testimony covering 125 pages of typewritten matter, indicating a desire to review such cause in good faith, and presented such a situation as would move the discretion of the court to grant an extension of the time asked for.

Act No. 340, Pub. Acts 1907, has received a construction by this court in the case of *Witham* v. *Clinton Circuit Judge*, 150 Mich. 568 (114 N. W. 337). There, as here, the relator sought to raise the question of the authority of the circuit judge to extend the time of taking an appeal from the decree in chancery, the contention being that under that act an appeal must be made in all cases within 40 days, as prescribed by section 2 of that act, and that no authority existed for extending the time beyond the 40 days. In that case Justice MONTGOMERY used the following language:

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"Section 2 standing by itself relates to an appeal upon the party's own initiative. It is to be construed in connection with section 6, and, as so construed, the last clause of section 2 simply forbids an appeal after time fixed by the statute by the party's own initiative and without an order from the court such as is provided in section 6. There is little room to doubt what is meant by the language of section 6. It authorizes the extension of time for the preparation, filing or service of *any papers herein provided to be prepared, filed or served*, with the proviso that the time shall not be extended *for the taking or perfecting of any appeal* so that more time may be consumed thereby than one year from the filing of the decree."

The writ was denied in that case, and it was held that the conduct of the circuit judge had been proper. In the recent case in this court of *Bliss* v. *Tyler*, 156 Mich. 640 (121 N. W. 292), an appeal had been dismissed, and upon a request being made that this court extend the time for perfecting a new appeal, this court said:

"The court below could doubtless deal with that question if it was presented to it."

We have examined with some care the authorities cited by the solicitors for the relator. The first four cases cited by the relator's solicitors relate to the rule governing circuit court applications for the allowance of an appeal from justice's courts after the five days' limitation. All those cases are governed by the statute, which is peculiar in its language, and it has been repeatedly held that this right of appeal is only given when the party has been prevented from appealing within five days "by circumstances beyond his control," which is the provision of the statute, and the discretion is confined to such cases. Here section 6 of the act of 1907 provides:

"The trial court or any judge thereof * * * may, upon cause shown, and reasonable notice given, extend the time provided in this act for the preparation, filing or service of any papers herein provided to be prepared, filed or served."

Other cases cited by counsel relate to appeals from the

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probate court, and in settling bills of exceptions in law cases, and in our judgment are not applicable here.

It seems to us that the showing made by Mr. Joslin in his affidavit was sufficient to authorize the circuit judge in his discretion to grant the extension complained of, and that the respondent was warranted in the conclusions which he reached. It is urged by relator's solicitor that this showing, or affidavit, was not made by the defendants, but by the solicitor. It appears, however, that Mr. Joslin was the solicitor for defendants at the time of making the affidavit. The facts stated by him were peculiarly within his own knowledge and related to his own conduct or action in the matter, and it seems to us that where the solicitor has knowledge of the facts, and it appears, as in this case, that there has been no laches or delay on the part of the defendants themselves, and that the only reason for the failure to file the claim for an appeal was the mistake of the solicitor himself, there is no necessity for submitting the affidavit of the parties, but it must be held that the affidavit of the solicitor is sufficient. The respondent, it seems to us, exercised a reasonable discretion under the statute upon the showing already indicated, and, having made the order, we do not think the same should be disturbed.

The writ will therefore be denied.

MONTGOMERY, C. J., and OSTRANDER, HOOKER, and MOORE, JJ., concurred.

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MOYER v. ANN ARBOR RAILROAD CO.

1. MASTER AND SERVANT—ASSUMPTION OF RISK — WORK OUTSIDE SCOPE OF EMPLOYMENT.
   Going to meals and taking dinner to his co-employés is not outside the scope of the employment of a section hand.

2. SAME—RAILROADS—INCREASE OF HAZARD—ASSUMPTION OF RISK.
   The increase of danger in riding upon an engine is an obvious risk, assumed by the servant.

3. SAME—DUTY TO PROMULGATE RULES—SYSTEM.
   The fact that a rule employed by a railroad company is a modification of one used by another company, which was not shown to result in greater safety to life and property than the defendant's rule would secure, does not justify the submission of the question of its sufficiency to the jury, where obedience to the rule adopted by defendant would have averted the injury.

Error to Gratiot; Searl, J. Submitted January 11, 1910. (Docket No. 37.) Decided February 3, 1910.

Case by John Moyer against the Ann Arbor Railroad Company for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

John T. Mathews and *Stone & Watson*, for appellant.

Benjamin S. Warren and *Codd & Drake*, for appellee.

BROOKE, J. Plaintiff's action is based upon the same facts, considered by this court, in the case of *Veit* v. *Railroad Co.*, 150 Mich. 358 (114 N. W. 233), where a full statement thereof will be found. In the *Veit Case*, the plaintiff was an engineer of one of the colliding trains; in the case at bar, the plaintiff was a section hand of six or seven years' experience. The wreck at Bagnall was

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within the limits of the section upon which plaintiff was employed. He was set to work by Cooley, his section boss, to help clear away the wreck. After working about half an hour, plaintiff was ordered by Cooley to get on the engine of No. 42 and go home (to Mesick) for his dinner, and to bring the dinners of the other section hands back to them. Plaintiff obeyed the order, and the engine proceeded to Mesick. Plaintiff received the injury complained of when the engine upon which he was riding collided with engine No. 7, which Veit was driving.

A verdict having been directed for defendant, plaintiff urges reversal in this court upon two grounds:

(1) That the court erred in instructing the jury that the plaintiff was a fellow-servant of Moody and Jepson.

(2) In refusing to submit to the jury the negligence of the defendant, with respect to its rules, adopted and in use at the time of the accident.

Plaintiff claims that, even if it be held that he was a fellow-servant of Moody and Jepson, he did not assume the risk of their negligence, because, in ordering him to go upon the engine and bring meals back to his fellows, defendant imposed upon him a dangerous duty, and one without the scope of his employment. We are of opinion that this position cannot be maintained. The going home to his own dinner, and the bringing of meals to his fellow laborers, was an incident of his employment. During his long employment as a section hand he had frequently ridden upon trains to and from his labor, but never before had ridden upon an engine in the performance of his duty.

It would scarcely be claimed, we think, that, if plaintiff had been injured while riding on passenger train No. 7, the train which collided with the engine upon which he was riding, and which was carrying many employés of defendant to the scene of the wreck, he had not assumed the risk of injury upon said train due to the negligence of fellow-servants. Travel to and from scenes of disaster upon railways is clearly an incident of the employment of an employé engaged in the maintenance of the track and

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roadbed, and it seems obvious that travel to and from the wreck, for the purpose of bringing food to those engaged in its removal, is likewise *necessarily* an incident of such employment. Does the fact that plaintiff rode upon the engine, instead of upon the train, modify this rule? We do not think it does. Travel upon a locomotive is of course more dangerous than travel in the train because, in the event of a collision, the passenger is nearer the point of impact. But this increase of danger is an obvious one, readily to be appreciated even by the inexperienced. A man of plaintiff's age and experience must have known and appreciated it. *Wheeler* v. *Berry*, 95 Mich. 250 (54 N. W. 876); *Gavigan* v. *Railway Co.*, 110 Mich. 71 (67 N. W. 1097), and cases cited.

2 Labatt on Master and Servant, § 624, states the rule as follows:

"A servant who, at the time of the accident in suit, was being transported on a railway car, or other vehicle furnished for the purpose of facilitating the performance of his work, is deemed to have been injured in the course of his employment, and therefore cannot recover if the injury was the result of a risk known to and appreciated by him. * * * The character of the train on which the servant was being transported is immaterial, provided it was being used as a means of conveyance to take him, in the course of the performance of his contract, to or from the place where his duties called him." Citing cases.

See, also, 26 Cyc. p. 1351, and cases cited; 34 Cent. Dig. §§ 501–503.

Plaintiff offered in evidence the rule books of the Pere Marquette Railroad Company, and the Chicago & Northwestern Railway Company, with special reference to rule No. 99, which differed in some respects from rule No. 99, adopted and in use by the defendant at the time of the accident. These exhibits have not been returned with the record, as was stipulated, but the fact is unimportant, for we must hold that the court below was correct in holding that the question of whether rule No. 99, as adopted by another company, would have afforded

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greater protection to plaintiff than did the one in use by defendant, was not a proper one to be submitted to the jury, upon this record. In *Seccombe* v. *Railway*, 133 Mich. 170 (94 N. W. 747), this court said (quoting from *Niles* v. *Railroad Co.*, 14 App. Div. [N. Y.] 58 [43 N. Y. Supp. 751]):

"The doctrine imposing liability upon railroad companies for failure to adopt particular rules, the necessity for which was not apparent to them, should not be unduly or unreasonably extended. And since the company has a paramount interest in protecting its property from injury or destruction, and also in avoiding all liability for damages to employés and passengers, * * * these considerations must have some weight in determining whether the omission to promulgate a particular rule constitutes a neglect of duty in not being able to foresee certain contingencies."

This court further cited with approval *Berrigan* v. *Railroad Co.*, 131 N. Y. 582 (30 N. E. 57), and *Morgan* v. *Iron Co.*, 133 N. Y. 666 (31 N. E. 234). See, also, *Whalen* v. *Railroad Co.*, 114 Mich. 512 (72 N. W. 323), *Enright* v. *Railway Co.*, 93 Mich. 409 (53 N. W. 636), and *Shadford* v. *Railway Co.*, 111 Mich. 390 (69 N. W. 661).

It was admitted that rule 99 in a modified form was in force on the Pere Marquette Railroad, but no testimony was introduced tending to show that such modification resulted in greater safety to life and property than did rule 99, as in use by defendant, and nearly all other railroads. Veit's testimony has been considered, but we are of opinion that it was not such testimony as under the authorities would warrant the court in submitting the question of the sufficiency of rule 99 to a jury. See *Berrigan* v. *Railroad Co.*, *supra*. But another reason exists why the question should not have been submitted. As this court found in considering the case of *Veit* v. *Railroad Co.*, *supra*, the accident resulted from a disregard by the train crew of No. 42 of "the well-understood rules made largely for the protection of their own lives."

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Had the employés of defendant, fellow-servants of plaintiff, obeyed rule No. 99, as in use by defendant company at the time of the accident, no accident would have occurred. The defendant "had the right to rely upon the observance of the rules by the trainmen." *Veit Case.* See, also, 26 Cyc. p. 1170, and cases cited.

Judgment affirmed.

HOOKER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

KALAMAZOO TRUST CO. v. MERRILL.

1. PARTNERSHIP—ACTIONS—PARTIES—JOINT OBLIGATIONS—ACTION AGAINST MEMBER OF FIRM.
   A partnership may not bring an action at law against one of its members, who would be both plaintiff and defendant in the same cause.

2. SAME—JOINT OBLIGATIONS WITH THIRD PARTIES—ACTIONS—EQUITY.
   An obligor, who is liable jointly and severally on a note, cannot be held in an action at law by one of the parties jointly liable with him until such co-obligor has paid the note or more than his proportion thereof; and then, only for contribution.

3. SAME.
   A copartnership, three of whose members are liable as makers or indorsers on a promissory note, and thereby disabled from bringing an action against a third person who is jointly and severally liable as their co-obligor, may not maintain an action against him on the obligation, and is limited to a suit in equity.

4. SAME.
   The right of such defendant is not in the nature of a set-off or

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contribution, but consists of a right to the adjustment of equities existing against those holders who are equally liable with himself.

5. SAME—TRUSTEE IN BANKRUPTCY—PARTIES.

The trustee in bankruptcy of a copartnership cannot bring such action if it might not be maintained by the bankrupt.

Error to Calhoun; North, J. Submitted January 12, 1910. (Docket No. 42.) Decided February 3, 1910.

Assumpsit by the Kalamazoo Trust Company, trustee in bankruptcy, against David L. Merrill on certain promissory notes. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed, and no new trial ordered.

Stewart & Jacobs and *Dallas Boudeman*, for appellant.

A. M. & C. H. Stearns and *Arthur B. Williams*, for appellee.

Gilkey, Bowman, Wilson, Dewey, Whitney and Stratton, were equal copartners, engaged in the banking business under the firm name of Union Bank, Whitney, Gilkey & Co. Gilkey, Bowman, and Wilson, together with defendant and several others, signed, either as makers or guarantors, promissory notes to the amount of $83,200. Gilkey signed with defendant, either as maker or guarantor, $83,000 of these notes. Bowman signed with defendant, either as maker or guarantor, $28,000 of these notes, and Wilson signed with the defendant, either as maker or guarantor, $22,000 of these notes. The notes all ran to Rell S. Wilson, cashier of the copartnership bank. As to $83,000 of the $83,200 worth of notes, the liability of Gilkey was the same as that of the defendant. Upon $28,000 worth of them Bowman was likewise equally liable. And upon $22,000 worth of them Wilson was likewise equally liable. These notes were discounted by the copartnership bank, and the money was used in connection with the

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business of two corporations, in each of which Gilkey, Bowman, Wilson, and defendant were stockholders. Wilson, besides being cashier of the bank, was manager of one of these corporations and treasurer of the other. No payments have been made on the notes by any person liable thereon. Defendant offered to show that he had paid $20,000 worth of other notes upon which Gilkey, Bowman, and Wilson were liable, which notes were given in connection with the same enterprises as those above mentioned were given. This proof was excluded. In November, 1907, the partnership bank was adjudicated a bankrupt, and each of the six partners was likewise so adjudicated. The plaintiff in this case was appointed and duly qualified as trustee, not only of the estate property and assets of the copartnership, but likewise of the property of each of the six partners. Plaintiff brought suit in assumpsit upon the notes against the defendant.

Under the plea of the general issue defendant gave notice of special defense in substance as follows:

"(1) That Patrick H. Gilkey, Elias W. Bowman, and Rell S. Wilson, three of the six men forming the copartnership, Union Bank, Whitney, Gilkey & Co., are joint makers and guarantors with the defendant on all the notes sued upon; that one joint obligor has no right of action against a co-obligor until he has paid the debt, and then his suit would be for contribution; that, neither Mr. Gilkey, Mr. Bowman, or Mr. Wilson having paid the notes, or any of them, they could not sue Mr. Merrill; that Gilkey, Bowman, and Wilson could not collect from the defendant a debt which they themselves owed as well as the defendant; that, Gilkey, Bowman, and Wilson, being barred from bringing suit themselves, they could not do so by joining in the action Wallace W. Dewey, Richard D. Whitney, and Asa Stratton, who are in privity with them; that the trustee in bankruptcy has no greater rights than the copartnership it represents, and could not bring an action which the partnership could not bring; that any proceedings brought either by said copartnership or its representatives on these notes owed by the defendant and three of its copartners should be in a court of equity where the interest of the copartners Wallace W. Dewey, Rich-

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ard D. Whitney, and Asa Stratton, who are not obligated on the notes, could be determined, where an accounting between the firm and Patrick H. Gilkey, Elias W. Bowman, and Rell S. Wilson might be had to ascertain whether they owed the partnership, or it owed them, and where the respective rights and interests of the co-obligors might also be adjudicated.

"(2) That the defendant, D. L. Merrill, had paid other notes to the amount of about $20,000, principal and interest, given at the same time, for the same purpose, in connection with the same transactions, and on which these same copartners Patrick H. Gilkey, Elias W. Bowman, and Rell S. Wilson were jointly obligated with the defendant. That the defendant has a legal and equitable set-off against all the notes and guaranties sued upon, they being the notes and guaranties of Patrick H. Gilkey, Elias W. Bowman, and Rell S. Wilson, three of the six members of this copartnership, and that a court of equity is the proper tribunal to sift out and determine the rights and liabilities of all parties at interest.

"(3) That the trustee has in its possession all of the property and assets of Patrick H. Gilkey, Elias W. Bowman, and Rell S. Wilson, which, under the bankruptcy statute, must be first applied to the payment of their individual indebtedness; that, the notes sued upon being the notes of these copartners and a part of their individual indebtedness, the said trustee, as a duty in carrying out his trust, should apply this property on said notes *pro rata* with other individual indebtedness; that if the defendant be compelled to pay these notes, he would have no recourse against the property of Patrick H. Gilkey, Elias W. Bowman, and Rell S. Wilson, as their estate is in the hands of the trustee, and would be distributed among those persons who were creditors of said parties at the time of the filing of their petitions in bankruptcy. For these reasons a court of equity is the proper tribunal.

"(4) That at the time the notes at issue were given it was the understanding and agreement that all parties should sign all notes; that as to all those notes not so signed the defendant is not liable.

"(5) That no steps were taken by either the copartnership, or by any one for or in its behalf, to charge the defendant as either indorser or guarantor, and for this reason he is not liable.

"(6) That the trustee has in its possession a large

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amount of collateral, to wit, $90,000, par value of the capital stock of the Price Cereal Food Company, given to secure the payment of the notes known as Price Cereal Food Company notes, for which collateral said trustee should account to this defendant and the other owners thereof, and credit the value of said stock on said notes.

"(7) That the notes were without consideration."

Proof was offered, but excluded, showing that the trustee proved its claim under these notes against Gilkey's individual estate for $95,502.13, and against Bowman's individual estate for $37,194.22. The schedule filed by Gilkey in bankruptcy shows individual assets of his in the hands of the trustee of nearly $50,000. The trustee also has in its possession individual assets of Mr. Bowman and Mr. Wilson to the value of several thousands of dollars. A verdict against defendant was directed by the court, to the amount of $81,789.76. The jury, upon questions of fact submitted by the court, found a further liability, bringing in a total verdict against defendant for $92,923.36. The case is before us upon writ of error.

BROOKE, J. (*after stating the facts*). Two questions are involved in this controversy:

(1) Could the copartnership bank itself have maintained a suit at law upon said notes, it being conceded that three of the six members were jointly liable with the defendant thereon?

(2) If this is answered in the negative, can the trustee maintain such suit?

With reference to the first question, we think it may be said to be settled law in this State that a copartnership may not maintain a suit at law against one of its partners, and the reason for the rule is that, inasmuch as *all* the partners have a *joint* interest in the claim, *all* are necessary parties plaintiff, and to permit the action would present the anomaly of a single individual acting as both plaintiff and defendant in the same suit. And it is elementary that in suits at law, by or against a copartnership, all the partners must be named as plaintiffs or de-

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fendants, as the case may be. As to both these propositions, the authorities (where, as in this State, the common law obtains) are practically unanimous. 30 Cyc. pp. 561, 567; Mechem on Partnership, §§ 130, 131, 147, 225; George on Partnership, p. 363; *Smith* v. *Canfield*, 8 Mich. 493; *Barber* v. *Smith*, 41 Mich. 138 (1 N. W. 992); *Learned* v. *Ayres*, 41 Mich. 679 (3 N. W. 178); *Davis* v. *Merrill*, 51 Mich. 480 (16 N. W. 864); *Carpenter* v. *Greenop*, 74 Mich. 664 (42 N. W. 276, 4 L. R. A. 241, 16 Am. St. Rep. 662); *McGowan* v. *Lamb*, 66 Mich. 615 (33 N. W. 881); *Grimes* v. *Bowerman*, 92 Mich. 258 (52 N. W. 751); *Reed* v. *Gould*, 105 Mich. 368 (63 N. W. 415, 55 Am. St. Rep. 453); *Stever* v. *Brown*, 119 Mich. 196 (77 N. W. 704). See, also, *Jacaud* v. *French*, 12 East, 317; *Bank of Toronto* v. *Nixon*, 4 Ont. App. 346; *Hoare* v. *Oriental Bank Corp.*, L. R. 2 App. Cas. 589; *In re Wakeham*, L. R. 13 Q. B. Div. 43; *De Mazar* v. *Pybus*, 4 Ves. Jr. 644; *Jones* v. *Blun*, 145 N. Y. 333 (39 N. E. 954); *Strauss* v. *Frederick*, 91 N. C. 121; *Chambers* v. *Sloan*, 19 Ga. 84; *Harris* v. *Visscher*, 57 Ga. 232; *Schreiner* v. *United States*, 6 Ct. Cl. 359; cases cited 15 Enc. Pl. & Prac. p. 839. The cases of *Kinney* v. *Robison*, 52 Mich. 389 (18 N. W. 120), *Mitchell* v. *Wells*, 54 Mich. 127 (19 N. W. 777), *Carpenter* v. *Greenop*, *supra*, and *Cook* v. *Canny*, 96 Mich. 398 (55 N. W. 987), relied upon by appellee, will be found, upon examination, to present exceptions to the rule rather than to afford any modification of it.

But it is urged by plaintiff's counsel that, even conceding this to be the rule, it has no bearing upon the case before us because Merrill, the defendant, was not a member of the copartnership, and therefore no reason exists under the authorities cited why he should not be made defendant in a suit at law wherein all the partners were parties plaintiff. This would be unquestionably true if in fact all six members of the copartnership bank are under no disability which would prevent them from becoming parties plaintiff in a suit at law upon these notes. It will be remembered that Gilkey, Bowman, and Wilson are jointly

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and severally liable with the defendant upon the paper. Can these three men, who, as we have shown, are *necessary* parties plaintiff, maintain a suit at law upon the notes against their co-obligor, no one of them having paid the debt secured thereby, or any part thereof? We think not. One joint obligor may not sue another joint obligor, upon their common obligation, until he has paid the debt, or a larger portion thereof than, as between himself and his co-obligor, he would be liable to pay. His action would then be for contribution. 9 Cyc. pp. 798–801, and cases cited; *Tobias* v. *Rogers*, 13 N. Y. 59. All six being necessary parties, and three being under disability, the suit at law could not be maintained by the copartnership bank.

Let us see what the result would be if the copartnership bank were permitted to maintain a suit at law upon the notes. For convenience, let us suppose that the notes amount to $100,000, and that Gilkey, Bowman, and Wilson are, with defendant, equally liable upon all of them. Then the bank would recover a judgment against defendant for $100,000, $75,000 of which it was the duty of Gilkey, Bowman, and Wilson to pay. And who receives the $100,000? The copartnership bank, one half of which is owned by Gilkey, Bowman, and Wilson. Therefore these three men, instead of paying $75,000, actually receive $50,000. Such a result would be manifestly monstrous.

It is not necessary that this defendant should first pay the notes, and then have recourse to a suit for contribution against his co-obligors. Nor is his claim against them one in the nature of a set-off, as claimed by appellee. It is his right to have the equities, as between himself and his co-obligors, adjusted in the action upon the instrument, where such instrument is, in part, the property of those equally liable thereon with himself, and this conclusion does no violence to the rights of the copartnership or of the three members thereof, not themselves liable upon the paper. The copartnership bank, in taking the paper of three of its members, must be presumed to have known

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that a suit at law could never be maintained thereon because of the lack of necessary parties plaintiff. This was an infirmity in the paper, apparent upon its face, and one which affected all the partners alike. No honest claim of the partnership, or of either of the partners, will, however, be lost or impaired. In a suit in equity the defendant must respond to the extent to which he is properly liable, but he will not be compelled to pay *to* his co-obligor a sum of money *for which* his co-obligor is liable.

Can the trustee (plaintiff herein) maintain the suit if its bankrupt, the copartnership bank, could not? Collier on Bankruptcy (7th Ed.), p. 810 *e*, states the rule as follows:

"It is well settled that a trustee takes, not as an innocent purchaser, but subject to all valid claims, liens, and equities. Thus he has no better title than the bankrupt had, and is affected with every equity which would affect the bankrupt himself if he were asserting the same rights and interest. A trustee in bankruptcy stands in the shoes of the bankrupt, and has no better title than he, in the absence of fraud, or of attaching or judgment creditors at the time of the filing of the petition. Where a right of action passes to the trustee, any defense, legal or equitable, which might have been raised against the bankrupt's claim may be raised against the trustee."

This rule finds support in the following cases, among others: *Chattanooga Nat. Bank* v. *Rome Iron Co.*, 102 Fed. 755; *Atchison, etc., R. Co.* v. *Hurley*, 153 Fed. 509, 82 C. C. A. 453; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415 (27 Sup. Ct. 720, 19 Am. Bankr. Rep. 201). See, also, Loveland on Bankruptcy (3d Ed.), p. 438.

After issue was joined in this case, but before trial, plaintiff proved its claim upon these notes, against the individual estates of Gilkey and Bowman, to the extent of their several liability thereon. Thereupon defendant filed a plea *puis darrein continuance*, setting up these facts, and at the trial offered proof thereof, which was excluded. The effect of this plea need not be considered here, be-

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cause the plaintiff, by reason of the disability pointed out, cannot maintain its action at law. In a suit in equity the assets in the hands of this plaintiff, belonging to the individual estates of defendant's co-obligors, will be marshaled in accordance with familiar rules.

The judgment is reversed, and no new trial is ordered.

HOOKER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

MOODY v. MACOMBER.

1. WILLS—DEEDS—EXECUTORS AND ADMINISTRATORS—CONVEYANCING.

   A deed containing a clause providing that it shall not become operative until the death of the grantor, when it is to have full force and effect, interpreted in the light of surrounding circumstances indicating such intent, is a testamentary disposition of property, revocable by a subsequent will.

2. SAME—DELIVERY.

   No estate passes with the delivery of a will to the devisee.

3. SAME—ESTATES OF DECEDENTS—EXECUTORS AND ADMINISTRATORS—AUTHORITY OVER REAL ESTATE—STATUTES.

   The executor, under a will which grants to him full power and authority to make such disposition of the estate as may be necessary to carry into effect the provisions of the instrument, obtains title to the land coupled with a power of sale, and may maintain ejectment. 3 Comp. Laws, § 9354.

4. EJECTMENT—PARTIES—WHO MAY MAINTAIN—TITLE AND POSSESSION.

   One entitled to the possession of land may maintain ejectment.

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Error to Lapeer; Smith, J. Submitted January 11, 1910. (Docket No. 23.) Decided February 3, 1910.

Ejectment by Paul B. Moody, executor of the last will and testament of John B. Sutton, deceased, against John B. Macomber. A judgment for plaintiff on a verdict directed by the court is reviewed by defendant on writ of error. Affirmed.

B. F. Reed, for appellant.

Geer, Williams & Halpin, for appellee.

Plaintiff herein brings ejectment against defendant to recover possession of a farm. It appears that prior to August 12, 1885, plaintiff's decedent was the owner in fee simple of the premises described. On that date he executed an instrument in the form of a deed to his wife, Louisa A. Sutton, covering said premises, and containing the following provision:

"This deed is not to become operative until the death of the grantor, named herein, at which time, and from then on, it is to have full force and effect."

Upon the same day plaintiff's decedent executed two other conveyances to his wife, covering other property, each containing the foregoing clause, and one of them containing the blanket provision, "and all other real estate of which I may die seised." He also, on the same day, executed a bill of sale of certain personal property to his wife, which contained the provision, "and all the personal property of which I may die seised." Louisa A. Sutton, the wife, executed an instrument to her husband on the same day, covering a store she owned in Lapeer, which contained the same provision found in the deed from her husband to her. All these deeds and the bill of sale were placed in an envelope, in a tin box, containing private papers of both Sutton and wife, which was kept in the safe at the store of Loder & Sutton. Sutton later re-

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tired from the partnership, but the box was found in the safe at the time of his death. Prior to his death, plaintiff's decedent sold a part of the home and the "Sanilac eighty," both of which were covered by the deeds to his wife. In the fall of 1902 plaintiff's decedent made a will, by the terms of which his wife took a life estate in the entire estate; the residue being disposed of among certain of the relations of the parties. This will was probated by plaintiff, and the real and personal property, coming into his hands as executor, was turned over by him to the widow, in accordance with the terms of the will. On April 10, 1907, Louisa A. Sutton executed a deed of the premises here in dispute to defendant, in consideration of "one dollar and other consideration." This deed was deposited with an attorney, and attached thereto was a letter of instructions providing for the delivery of the deed at Mrs. Sutton's death, and the payment to her of $300 per year during her life. She died about one year later. Plaintiff then brought this action. A verdict was directed for plaintiff, and defendant has removed the case here by writ of error.

BROOKE, J. (*after stating the facts*). But two questions are presented:

(1) Does the deed in question convey a present interest, or is it testamentary in character, and therefore revoked by the will of 1902?

(2) Has the plaintiff, as executor under the will, such an interest in the farm in question as will enable him to maintain ejectment?

Gardner on Wills, at page 24, states the rule as follows:

"The essential difference between a deed and a will is that a deed must pass a present interest in the property, although the right to possession and enjoyment may not accrue until some future time, while an instrument, which passes no interest until after the maker's death, is a will. * * * Regard must be had to the intention of the

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maker viewed in the light of the language of the instrument, and the circumstances surrounding the parties and attendant upon its execution"—citing cases.

1 Underhill on Wills, § 37, in discussing the question, uses language to the same effect. See, also, Borland on Wills, § 8, and cases cited.

Applying the foregoing rule to the case at bar, we find that there is no ambiguity in the language used:

"This deed is not to become operative until the death of the grantor named herein."

These words can have but one meaning, viz., that *no interest* passed to the grantee thereunder until the happening of the event described. It is manifest that the instrument cannot be *inoperative*, as provided by its terms, and at the same time *operative*, to convey a present interest to be enjoyed by the grantee, at the death of the grantor. Nor is the meaning of the language quoted enlarged, restricted, or in any wise changed by the words following the quotation. If we look to the circumstances surrounding the parties at the time of the execution of the instrument (which is unnecessary in this case), in order to ascertain the intent of the parties, there can be no doubt that both Sutton and his wife believed that, in executing deeds to each other to become operative at death, they were making a testamentary disposition of their several estates. The fact that John B. Sutton, in his lifetime, deeded away two parcels described in the deeds to his wife is significant as to his understanding of the effect of the instrument. The language contained in one of the deeds, "and all other real estate of which I may die seised," is also important as indicating a testamentary intention on the part of the grantor.

Another important fact, as bearing upon his intention, is that in 1902 he made a will by the terms of which his wife was given a life estate only. Similar provisions have frequently been construed by this court. In the late case of *Leonard* v. *Leonard*, 145 Mich. 563 (108 N. W. 985),

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the language construed was: "This deed is not to become operative until after the death of the parties of the first part hereto"—where this court said:

"The words used cannot be said to apply simply to the enjoyment and possession of the property, but to the entire force and effect of the instrument, and are repugnant to the creation of a present interest."

See, also, *Bigley* v. *Souvey*, 45 Mich. 370 (8 N. W. 98); *Lautenshlager* v. *Lautenshlager*, 80 Mich. 285 (45 N. W. 147); *Ferris* v. *Neville*, 127 Mich. 444 (86 N. W. 960, 54 L. R. A. 464, 89 Am. St. Rep. 480); *Lincoln* v. *Felt*, 132 Mich. 49 (92 N. W. 780); *Clay* v. *Layton*, 134 Mich. 337 (96 N. W. 458); *In re Dowell's Estate*, 152 Mich. 194 (115 N. W. 972). The instrument, though in form a deed, was in fact a will. We find no evidence in the record of the delivery of the instrument, but whether it was delivered or not is of no consequence if, in fact, it was testamentary in character. The delivery of a will conveys no estate to a devisee therein named.

Can the executor maintain ejectment? The language of the will is as follows:

"I hereby nominate, constitute and appoint Paul B. Moody, executor of my last will and testament, with full power and authority, upon the decease of my said wife, Louisa A. Sutton, to make such disposition of any and all of the property of which I may die seised and possessed, as may be necessary to carry out the provisions of this instrument."

The statute gives to the executor the right to the possession of all real and personal estate of the deceased. Section 9354, 3 Comp. Laws. The right of an executor to maintain ejectment under this statute has been upheld. *Kline* v. *Moulton*, 11 Mich. 370; *Barlage* v. *Railway Co.*, 54 Mich. 564 (20 N. W. 587). One entitled to the possession of land merely may maintain ejectment. *Covert* v. *Morrison*, 49 Mich. 133 (13 N. W. 390); *Shaw* v. *Hill*, 79 Mich. 87 (44 N. W. 422). But we are of opinion that the language of the will above quoted is

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broad enough to convey title to the land in question coupled with a power of sale, though the land is not specifically described.

The judgment must be affirmed.

MONTGOMERY, C. J., and HOOKER, MCALVAY, and BLAIR, JJ., concurred.

BULL *v.* HEPWORTH.

COMPROMISE AND SETTLEMENT — ESTATES OF DECEDENTS—CONSIDERATION—FRAUD.

In the absence of fraud or overreaching, the compromise of a claim against the estate of a decedent, made to avoid the expense of litigation by one in possession of the entire property under a conveyance made by the deceased to take effect at his death, is supported by adequate consideration, and is not subject to rescission in equity.

Appeal from Cass; Des Voignes, J. Submitted January 13, 1910. (Docket No. 53.) Decided February 3, 1910.

Bill by Eunice Bull against Josephine Hepworth for the cancellation of a note and mortgage for fraudulent representations. From a decree dismissing the bill, complainant appeals. Affirmed.

John R. Carr, for complainant.

Clyde W. Ketcham (*John W. Adams*, of counsel), for defendant.

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Cornelius Terwilliger owned a farm of 80 acres in Cass county, upon which he resided for a number of years, and up to the time of his death, which occurred November 18, 1907. He had no children, and died intestate. His wife had died several years earlier. Complainant, his niece, and a widow, worked for him for six months in the year 1904, and after his wife's death returned to him in October, 1905, remaining until his death in the capacity of housekeeper. On October 31, 1907, about two weeks before his death, Terwilliger deeded his farm to complainant. This deed was not delivered, but was held by the justice of the peace who took the acknowledgment, and delivered to complainant after the funeral. The deed contained the proviso: "This deed, to take effect at my death." Defendant had made eight trips from her home in Kansas to nurse and care for Terwilliger and his wife. These visits together covered a period of about two years. They were made at the request of Terwilliger, and under a promise of remuneration, as shown by numerous letters from him to defendant. After the funeral defendant made a claim to complainant that Terwilliger was indebted to her for her services in nursing him and his wife, and for expenses of travel between Kansas and Michigan, incurred by her at Terwilliger's request. The parties had several conferences about the matter, and it was finally agreed between them that complainant should give defendant a note for $1,000, secured by a mortgage on the south half of the farm, in full satisfaction for defendant's claim against Terwilliger's estate. On December 3, 1907, this note and mortgage were executed by complainant. It was recorded on December 5, 1907, and two days later, complainant filed her bill herein, seeking to set aside said note and mortgage for fraud and lack of consideration. At this time no administration had been asked for upon Terwilliger's estate, and complainant was in undisputed possession thereof, personal as well as real. The only known claim against the estate was that of defendant.

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BROOKE, J. (*after stating the facts*). The record discloses absolutely no evidence of fraud or overreaching on the part of the defendant. There is, then, but one question remaining for determination.

Can one who is in possession of the entire estate of a decedent settle and compromise a claim against the estate, and is the forbearance to sue said claim a sufficient consideration for the payment of the sum agreed upon in settlement? This question should, we think, be answered in the affirmative. The case of *Teed* v. *Marvin*, 41 Mich. 216 (2 N. W. 20), relied upon by the complainant, is clearly distinguishable from the case at bar, and the long line of decisions cited by complainant, to the effect that claims against an estate are barred unless presented within the time limited for that purpose, have no application. Here, immediately after Terwilliger's death, complainant, who is in possession of his entire estate (an estate clearly burdened in her hands with all the just debts of Terwilliger), effects a compromise of defendant's claim, with the particulars of which she is fully familiar, for the purpose of avoiding the expenses of administration and (possibly) an expensive legal controversy over said claim. There surely is no reason, either in law or equity, which would not uphold and encourage such settlements, in the absence of fraud. The forbearance of defendant to present her claim was an adequate consideration for the payment to her of the money agreed upon. In *Van Dyke* v. *Davis*, 2 Mich. 145, this court said:

"It is a principle well established that the compromise and settlement of an asserted claim involved in legal controversy, be it never so doubtful, constitute a sufficient consideration for the settlement, and for any obligations given by one party to the other in consideration of such settlement"—citing *Weed* v. *Terry*, 2 Doug. (Mich.) 344 (45 Am. Dec. 257).

See, also, *Wehrum* v. *Kuhn*, 61 N. Y. 623; 8 Cyc. p. 505, and cases cited.

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We are of opinion that complainant was fully advised of her rights in the premises, and that she made a wise adjustment with defendant.

The decree is affirmed, with costs.

HOOKER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

OBLASER v. WAYNE CIRCUIT JUDGE.

1. CRIMINAL LAW—PROCEDURE—ADJOURNMENT OF EXAMINATION.
   No formal adjournment is necessary on preliminary examination of a person charged with a crime, where the testimony was taken by a stenographer before the examining magistrate, and the decision of the justice to bind over the respondent announced orally, and after twelve days the witnesses were brought in, signed their testimony as extended, and the defendant was remanded into custody.

2. SAME—EVIDENCE—JUDICIAL NOTICE.
   The court will take judicial notice of the fact that some time is required to reduce stenographic notes of testimony taken on preliminary examination to typewritten form.

3. SAME—ORDER OF JUSTICE ON PRELIMINARY EXAMINATION—PREMATURE ACTION.
   It does not preclude further action in the case for the justice to announce his decision to bind over the respondent under the testimony, at the close thereof, before it has been signed by the witnesses.

4. SAME—BINDING OVER RESPONDENT.
   The intention to make a valid order and to sign the testimony at the proper time will be presumed.

5. SAME—RETURN OF JUSTICE—REQUISITES.
   The return of the examining magistrate, which is defective in

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not being properly verified, or in failing to contain the signed testimony and a proper affidavit, may be amended or a new return filed.

Mandamus by August Oblaser to compel Henry A. Mandell, circuit judge of Wayne county, to vacate an order denying a motion for an amended return by an examining magistrate. Submitted January 13, 1910. (Calendar No. 23,774.) Writ denied February 3, 1910.

Philip A. McHugh and *William Henry Gallagher*, for relator.

Philip T. Van Zile, Prosecuting Attorney, and *Fred H. Aldrich*, Assistant Prosecuting Attorney, for respondent.

HOOKER, J. The defendant being before the circuit court on a charge of murder, to which he had not pleaded, caused this motion to be made for an order for an amended return by the examining magistrate, claiming that the return made under date of August 31, 1909, does not show all that occurred, and that a true amended return would show that defendant had not been accorded a lawful and valid examination. It is shown by defendant's affidavit: That the witnesses for the prosecution were examined and testified on August 19th before the justice and in the presence of the defendant that upon said day he was bound over to the circuit court for trial, and remanded to the jail to await trial, by the following oral order:

"*The Court:* Oblaser, I find that there is probable cause to connect you with this crime, and I bind you over to the circuit court for trial, and I remand you to the custody of the sheriff."

That afterwards, and before August 30th, the justice delivered to the prosecuting attorney his return, to be filed in the circuit court by him or his assistants. That afterwards said justice caused said witnesses to be subpœnaed, and they appeared before said justice on August

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31st, and signed a typewritten transcript of their testimony in the presence of the defendant and his counsel. No order of continuance having been made or entered, that thereafter, and on the 31st day of August, said justice made and caused to be filed a return, which did not include a statement of the facts alleged, that no continuance of the examination was made or entered upon August 19th at the close of the examination. The motion was made on November 18th, and was based on an affidavit of the defendant made on that day. It is inferable that the testimony was taken by a stenographer, and that it was afterwards transcribed. The statute (3 Comp. Laws, § 11853) permits the testimony to be reduced to writing under the direction of the justice, and we may take judicial notice that, where taken by a stenographer, some time is required to reduce it to typewriting, as was apparently the case here. On August 31st the defendant was brought in, the witnesses appeared, their testimony was read over to them, and was subscribed by them in the presence of defendant and his counsel. This was in our opinion a proper proceeding, unless the justice had lost his jurisdiction (1) by a failure to adjourn or hold open the cause to a day certain; (2) by the alleged order of commitment; (3) by his alleged return delivered to the prosecuting attorney to be filed.

In the case of *Hamilton* v. *People*, 29 Mich. 176, it was said:

"The justice, in these examinations, does not act judicially in the technical sense, but in his capacity of a conservator of the peace, and the proceeding is one which at common law was conducted very much at discretion. It is possible that the regularity of the arrest and continued custody of the prisoners may have been open to question; but we have found no authority for holding that a criminal examination before a justice is void if a complaint has been made before him on oath, and the accused are finally held to bail or committed on a law day upon testimony taken in their presence in pursuance of it. Whether irregular or not, we find no author-

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ity for regarding such proceedings as nullities. We can see no reason why a complaint properly verified should cease to be valid to maintain an examination unless the parties accused are either discharged or held to commitment so long as there is no substantial break in the proceedings. No formal record is required to be kept of them, and the continuance from day to day is not an adjournment of such a nature that the failure to announce it would be of any consequence. The proceedings are by the statute contemplated as continuous, unless formally adjourned from time to time, and the close of business on one day would carry it over until the next business day as a matter of course, unless otherwise ordered. The adjournment to the 22d, if illegal, would not interrupt a legal course, which would take the matter over to the 23d; and whether the justice did or did not consider some testimony which was not admissible because irregularly taken his discretion in ordering the commitment cannot be reviewed in any such way as proposed here. The plea does not dispute the fact that there was a preliminary examination upon a proper complaint before a magistrate having jurisdiction resulting in a commitment; and this we think was all that was necessary to justify proceeding by information."

In the present case the testimony was taken and defendant was remanded. When the testimony was ready for signature, the cause was taken up and proceeded with. We are not advised that any objection was made to this at the time or that any change was made in the testimony as taken, and we feel justified in saying that it was a continuous proceeding within the holding in the *Hamilton Case*, and that no formal adjournment or designation of time was necessary.

2. It is contended that the order remanding and binding over was invalid because made before the testimony was signed, and that it was a final disposition of the matter precluding further action. If it is true that the order was void because premature, it was of no effect, and ought not to preclude the further action of preparing and signing the testimony, which was evidently necessary. This, in the absence of clear proof to the contrary, we

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must presume to have been intended; and also the making of another order when it would be valid. The fact that the justice after hearing the testimony announced his conclusion is not inconsistent with an intention to have the examination completed and testimony signed, when he would necessarily have to make a formal certificate and return whether he had previously announced his conclusion or not.

3. The alleged return to the prosecuting attorney is open to several suggestions.

(*a*) It is not proven, being stated only on information and belief.

(*b*) It was an inadequate return for the reason that it did not contain the signed testimony. Indeed, the affidavit does not show what it consisted of.

(*c*) If it were invalid or incomplete, it was competent for the justice to amend it before filing or make a new one.

The writ is denied.

MOORE, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

ADAMS & FORD CO. *v.* CULLEN.

JUSTICES OF THE PEACE—ADJOURNMENTS—SHOWING REQUIRED—JURISDICTION—STATUTES.

A justice of the peace, who adjourns an action against the objection of one party without a sworn showing of cause, loses jurisdiction. 1 Comp. Laws, § 791.

Error to Ogemaw; Sharpe, J. Submitted January 13, 1910. (Docket No. 68.) Decided February 3, 1910.

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Assumpsit in justice's court by the Adams & Ford Company against Michael J. Cullen for goods sold and delivered. There was judgment for plaintiff, and defendant appealed to the circuit court by writ of certiorari. A judgment for plaintiff is reviewed by defendant on writ of error. Reversed.

William T. Yeo, for appellant.

Bennett & Moore, for appellee.

HOOKER, J. Plaintiff, a nonresident corporation, sued defendant in assumpsit in justice's court. Defendant appeared specially upon the return day, and moved to dismiss the cause for the neglect of plaintiff to file security for costs. This motion was overruled, whereupon plaintiff's counsel offered to become security. The defendant objected to this, upon the sole ground that the statute prohibited such action, and the justice so held. Thereupon, without a showing on oath, plaintiff moved an adjournment of the cause for the purpose of obtaining a surety, and this motion was granted against defendant's objection. On such adjourned day defendant did not appear, and plaintiff took judgment. The judgment was affirmed on certiorari by the circuit court, and it is before this court by writ of error.

We are constrained to reverse the judgment upon the ground that the justice lost jurisdiction by his adjournment of the cause without a showing on oath that it was necessary. A justice's power to adjourn a cause against objection rests upon the statute, which requires a showing on oath. See *Stadler* v. *Moors*, 9 Mich. 267; *Warner* v. *Comstock*, 55 Mich. 618 (22 N. W. 64). It has been held that an unauthorized adjournment ousts the justice of jurisdiction. *Stadler* v. *Moors*, *supra*; *Ruberts* v. *Hathaway*, 42 Mich. 502 (4 N. W. 307); *Segar* v. *Lumber Co.*, 81 Mich. 344 (45 N. W. 982).

Judgment reversed, with costs of all courts.

MOORE, MCALVAY, BLAIR, and STONE, JJ., concurred.

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DULL v. ROYAL INSURANCE CO.[1]

1. INSURANCE—TORNADO INSURANCE—TITLE.
A policy of insurance against damage by tornado, issued in the name of an owner, who at the time of the issuance was under contract to convey the property to a corporation, of which he was a stockholder, and who subsequently conveyed the same without the consent of the insurer, is void under a clause in the policy by which the policy is declared invalid if the insured was not the sole and unconditional owner, and if any conveyance should be made without the consent of the company.

2. SAME — PRINCIPAL AND AGENT—ADVERSE INTEREST OF AGENT.
An agent cannot represent and bind two parties having opposing interests in the same transaction, nor can he be at the same time a party and an agent of the opposite party, unless all persons in interest know of the dual relation and assent to it.

3. SAME—GOOD FAITH OF AGENT—INTEREST IN TRANSACTION.
If an agent for an insurance company is personally interested in the property insured, no policy issued by him thereon, or act done by him in connection therewith, binds the insurance company unless it knows of and assents to the situation.

4. SAME—WAIVER OF DEFENSES.
The defense of forfeiture for a change of title is not waived by omitting to claim a forfeiture in the first letter written by the insurance company to the insured, which stated that the matter would be referred to its agent, where a subsequent letter expressly claimed the right to rely on all defenses.

Error to Wayne; Rohnert, J. Submitted January 14, 1910. (Docket No. 73.) Decided February 3, 1910.

Assumpsit by John H. Dull, trustee, against the Royal Insurance Company on a policy of insurance. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

[1] Rehearing pending.

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Arthur D. Prosser, for appellant.

Lucking, Emmons & Helfman and *Charles B. Obermeyer*, for appellee.

Plaintiff sues in assumpsit to recover on a tornado insurance policy, issued by defendant to one Pfuntner, June 15, 1907. Defendant pleaded the general issue, and set up as a special defense that the title to the property insured had been changed after the date of the policy, and before the loss, without the consent of defendant indorsed in writing on said policy, thus avoiding the policy according to its terms. The policy contract contained the following provision:

"In case any change shall take place in the title or possession of the property herein described (except by succession) by reason of the death of the assured whether by legal process or judicial decree, or voluntary transfer or conveyance; or if the assured shall not be the sole and unconditional owner in fee of said property; or if this policy shall be assigned, without consent of this company indorsed in writing hereon, then in each and every one of the above cases this policy shall immediately become null and void. * * *

"This policy is made and accepted subject to the foregoing conditions and stipulations, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed or held to have waived such provision or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached hereto."

It appears that Pfuntner owned certain lands in Macomb county; that in January, 1907, Pfuntner, Dull, Ebert, Kearney, and Beiderman, formed a corporation

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known as the Rochester Sandstone Brick Company. Beiderman was a stockholder, member of the board of directors, and vice president of this company from the time of its formation to the time of the trial in the court below. Pfuntner, in the same month, entered into a contract with the company to erect a brick plant on his land, and convey the same to the company, for a certain sum of money in cash and a certain amount of the capital stock of the company. He proceeded to erect the plant, and in June, 1907, insured it in his own name, against loss by fire or tornado. This insurance was issued to him by the defendant upon the solicitation of Beiderman. The insurance was paid for in November, 1907, and February, 1908, by Dull to Beiderman, the checks being indorsed by Beiderman to Detroit Insurance Agency. On February 3, 1908, Pfuntner deeded the property covered by the policy in question to John H. Dull, trustee, plaintiff herein, Dull acting as trustee for the Rochester Sandstone Brick Company. No notice of this transfer was given to defendant. The loss occurred April 25, 1908. No testimony was introduced tending to show that Beiderman was the agent of defendant company, nor was it shown that Beiderman knew of the transfer of the title from Pfuntner to Dull, trustee. The policy was countersigned by the Detroit Insurance Agency, by George J. Gnau. Neither Beiderman, nor any member of the Detroit Insurance Agency, was sworn as a witness. A verdict was directed for defendant.

BROOKE, J. (*after stating the facts*). We are of opinion that the policy in question must be held to have been void at the time of its issuance, by reason of the fact that Pfuntner was not at that time "the sole and unconditional owner in fee of said property," or became void upon the transfer of title to plaintiff, without consent of defendant, unless it can be said that Beiderman knew of the condition of the title at the time the insurance was

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written, that he knew of the transfer from Pfuntner to Dull, trustee, and that his knowledge was binding upon defendant. *Jaskulski* v. *Insurance Co.*, 131 Mich. 603 (92 N. W. 98), and cases cited; *Cronin* v. *Fire Ass'n*, 123 Mich. 277 (82 N. W. 45), and cases cited; *A. M. Todd Co.* v. *Insurance Co.*, 137 Mich. 188 (100 N. W. 442).

It is urged for the plaintiff that, inasmuch as Beiderman was a stockholder in and an officer of the brick company, not only at the time the contract with Pfuntner was made, but also at the time Pfuntner deeded to Dull, as trustee, for the brick company, he must be held to have had knowledge of the condition of the title, and that the defendant is bound by his knowledge so gained. We cannot agree with this view. The record fails to show in what capacity Beiderman solicited the insurance, whether as agent, or broker, or in his capacity as an officer of the company, which at that time held a contract interest in the property, and is silent as to his connection with the defendant, except that the premium passed through his hands, on its way into the hands of the Detroit agency of defendant. Even if it were clearly proven that in soliciting the insurance he acted as agent for defendant, we think the defendant company would not be bound by uncommunicated facts, coming to his knowledge in his capacity as an officer or stockholder of the brick company. An agent cannot bind two parties having opposing interests in the same transaction, nor can he be at the same time a party and the agent of the opposite party, unless both parties know of the dual relation and assent to it. Mechem on Agency, §§ 66–68.

There is no evidence that the defendant knew of Beiderman's connection with the brick company, or with Pfuntner, or even knew of his existence. It seems to be settled law that, if an agent is personally interested in the property insured, no policy issued by him thereon, or act done by him in connection therewith, binds the insurance company, unless known and assented to by it. 1 May

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on Insurance (4th Ed.), § 125; 3 Cooley's Briefs on Insurance, p. 2529; 22 Cyc. p. 1435; *Zimmerman* v. *Insurance Co.*, 110 Mich. 399 (68 N. W. 215, 33 L. R. A. 698); *Spare* v. *Insurance Co.*, 19 Fed. 14; *Ritt* v. *Insurance Co.*, 41 Barb. (N. Y.) 353; *Arispe Mercantile Co.* v. *Insurance Co.*, 133 Iowa, 272 (110 N. W. 593, 9 L. R. A. [N. S.] 1084, and authorities collected in note); *Greenwood Ice & Coal Co.* v. *Insurance Co.*, 72 Miss. 46 (17 South. 83); *Wildberger* v. *Insurance Co.*, 72 Miss. 338 (17 South. 282, 28 L. R. A. 220, 48 Am. St. Rep. 558); *New York Central Ins. Co.* v. *National Protection Ins. Co.*, 14 N. Y. 85; *Rockford Ins. Co.* v. *Winfield*, 57 Kan. 576 (47 Pac. 511); *Glens Falls Ins. Co.* v. *Hopkins*, 16 Ill. App. 220; *British America Assurance Co.* v. *Cooper*, 6 Colo. App. 25 (40 Pac. 147). Particular attention is directed to the case of *Arispe Mercantile Co.* v. *Insurance Co.*, *supra*, where the facts are nearly identical with those in the case at bar and where the opinion is exhaustive and supported by many authorities.

It is claimed by plaintiff that defendant, after receiving notice of the loss, so conducted itself that it must be held to have waived the forfeiture. This claim is based upon the following correspondence:

"DETROIT, MICH., May 1, 1908.

"LAW BROS., Mgrs.,
"Royal Ins. Co.,
"Royal Ins. Bldg.,
"Chicago, Ill.,

"*Gentlemen:* Referring to tornado policy No. 10742339 in favor of Charles H. Pfuntner, Detroit, Mich. Through an unfortunate and uncalled for remark made by Mr. Pfuntner who dropped into the office during my conference with Mr. Duffey, negotiations for settlement of loss were abruptly terminated and I was referred to your office for adjustment, Mr. Duffey apparently being very much angered and would have no further hand in the matter, a condition I very much regretted, when it was found he would not continue interview to a satisfactory conclusion. The situation is just this: Mr. Pfuntner and I engaged

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in the proposition of a sand lime brick plant near Rochester, Mich., a year ago and, while it was a stock company, all the property consisting of a farm of 150 acres, buildings, etc., were in his name and were to be turned over to the company when he had fulfilled certain requirements which he failed to do, and I purchased Mr. Pfuntner's interest in the property Feb. 1, '08, paying him what he actually put into the deal, part cash and the balance notes coming due 3 and 6 months from date of contract, Feb. 1, '08, for him to sell and I to buy; at the fulfillment of this contract he is to turn over all his rights, title and interest, etc., to me. In the meantime he deeded the property to me turning over to me all insurance policies but still retaining a few shares of stock to keep the organization intact until such time as I made my final settlement with him when he would under the contract be obliged to sever his connection with the brick company. Now then, during this time a technical violation of the provisions of the above named policy took place, that is to say, I failed to present the matter to your company for a transfer of the policy from Mr. Pfuntner to me, an oversight for which I may be responsible personally, notwithstanding the fact it was known to the representative of the Royal Ins. Co. that change of ownership of the property had taken place a month or six weeks prior to the loss by windstorm which occurred between 11 and 12 o'clock a. m. Saturday, April the 25th, '08. The question of the transfer of the policy was not referred to and it did not occur to me till the accident to the building happened when the thought came to me that we had a tornado insurance policy on the property and on looking it up found the stipulations in the same had not been carried out. The adjustment was taken up with your representatives here, and was cut off, as said before, very suddenly through no fault of mine at all, but much to my discomfort and regret. Will you kindly take the case up with Mr. Duffey and have him continue the investigation and settlement of my claim. Please understand I am not criticising Mr. Duffey's attitude in the way he took offense at Mr. Pfuntner's remark as any person with a spark of manhood in him would no doubt have resented the insult. But bear in mind as you go along that I am not responsible for it, and do not under any circumstances approve or resort to any such tactics.

"Yours truly,

"J. H. DULL."

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"CHICAGO, 5th May, 1908.

"Mr. J. H. DULL,
"President and Manager, The Rochester Sandstone Brick Co.,
"Detroit, Mich.

"*Dear Sir:* We are in receipt of your favor of the 1st instant, having reference to a conversation had with our State agent, Mr. B. T. Duffey, and have carefully noted contents. We will take up the matter with that gentleman. We are, dear sir,

"Yours very truly,
"LAW BROS., Managers."

"DETROIT, MICH., May 9, 1908.

"Messrs. LAW BROS., Mgrs.,
"Royal Ins. Bldg.,
"Chicago, Ill.

"*Gentlemen:* Referring to yours of the 5th inst., Mr. Duffey has been absent since receipt of yours till today, when I fully expected to have him meet me, but he declined to do so pleading other business would prevent. I have power of attorney from Mr. Pfuntner, the assured, to settle this claim and to receive full benefits of policy No. 10742339. The damage has been carefully estimated by the parties who erected the building, and furnished the material, I hereby give you this formal notice that the damage amounts to $1,043.92 an excess of $43.92 over and above the amount of the policy. I trust you will promptly adjust my claim. An early reply will greatly oblige,

"Yours truly,
"J. H. DULL."

"CHICAGO, May 15, 1908.

"Mr. JOHN H. DULL,
"Majestic Building,
"Detroit, Mich.

"*Dear Sir:* We beg to own your letter of the 9th inst. with reference to policy 10742339 of this company issued at its Detroit, Mich. agency, to Charles H. Pfuntner, and in reply thereto have to say that if in the opinion of yourself or your attorney, a valid claim exists against this company by reason of said policy contract, you are referred to the contract itself for instructions as to such action as you may see fit to take.

"You are hereby notified that this company has not waived, does not waive, and does not intend to waive any

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of its rights under said contract, nor any of the terms or conditions thereof. We are, dear sir,

"Yours very truly,

"L. C. STARK, Loss Supt."

Plaintiff urges that, because defendant did not in its first letter claim a forfeiture, it therefore waived its right to insist on it later, citing *Walter* v. *Insurance Co.*, 120 Mich. 35 (78 N. W. 1011); *Burnham* v. *Casualty Co.*, 117 Mich. 147 (75 N. W. 445); *Rauch* v. *Insurance Co.*, 131 Mich. 281 (91 N. W. 160); *Granger* v. *Assurance Co.*, 119 Mich. 177 (77 N. W. 693); *Cleaver* v. *Insurance Co.*, 71 Mich. 414 (39 N. W. 571, 15 Am. St. Rep. 275); *Marthinson* v. *Insurance Co.*, 64 Mich. 372 (31 N. W. 291). An examination of these cases shows that in each one of them the defendant company did some act which induced the plaintiff to go to trouble or expense, without disclosing the fact that it intended to claim a forfeiture. The letters, written by defendant herein, cannot be construed as an invitation to plaintiff to act or refrain from acting to his detriment; on the contrary, we think they fully advise plaintiff that defendant intended to rely upon its legal rights.

The other errors assigned have been considered, but require no discussion.

The judgment is affirmed.

HOOKER, MOORE, MCALVAY, and BLAIR, JJ., concurred.

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GRAND RAPIDS BREWING CO. v. PETTIS.

1. FRAUDULENT CONVEYANCES—BILL OF SALE AS MORTGAGE.
   In an action of replevin, a plaintiff corporation, which claims title to a stock of goods under a bill of sale executed by one of its customers, a hotel keeper, in the business of selling intoxicating liquors, and which is shown by evidence in the case to have taken the conveyance as security for a debt, leaving the property in the possession of the grantor, without recording its evidence of title in the office of the township clerk, is properly denied the right to recover the goods as against an officer who levied thereon in behalf of a judgment creditor of the hotel keeper, since the evidence tends to support the contention of defendant that the property was transferred in fraud of the creditors, and the transaction was presumptively fraudulent under 3 Comp. Laws, §§ 9520, 9521.

2. SAME—TRIAL—CONDUCT OF COURT—APPEAL AND ERROR.
   The action of the trial judge in asking of a witness who advised the landlord as to his exemptions and who had also acted as attorney for plaintiff, as to his theory of the right to exemptions, was not prejudicial, in view of the charge which instructed the jury that the acts of such witness were not binding on the plaintiff except to show the acts done by them in conjunction.

3. SAME—EXECUTIONS—RIGHT OF OWNER.
   The plaintiff's right to a judgment, in an action of replevin involving its title to the property, could not be affected by the defendant's omission to prove that the costs for which the execution was issued were properly taxed.

4. TRIAL—CONDUCT OF COUNSEL—CROSS-EXAMINATION.
   In cases which involve the good faith of a party, the extent of cross-examination bearing on the question is discretionary.

5. SAME—CROSS-EXAMINATION—COLLATERAL MATTERS.
   Inquiries as to immaterial matters, which are answered favorably to the appellant and not objected to at the time or presented on motion for a new trial, do not constitute reversible error.

Error to Kent; Perkins, J. Submitted January 18, 1910. (Docket No. 84.) Decided February 3, 1910.

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Replevin by the Grand Rapids Brewing Company against Edwin Pettis. A judgment for defendant is reviewed by plaintiff on writ of error. Affirmed.

Maher & Barnard, for appellant.

Fred P. Geib, for appellee.

OSTRANDER, J. The defendant is under-sheriff of Kent county. He executed a writ of *fieri facias* issued to collect a judgment for costs in favor of Lena Liebler and against Isaac W. Carrel by seizing certain chattels found in the possession of said Carrel and used by him in conducting his business of keeping a hotel and a bar therein for the sale of liquors. The household furniture of Carrel was not seized. The seizure was made on Saturday. On the following Monday the judgment debtor claimed the right to some of the chattels as exempt from execution and defendant set aside, upon his demand, liquors and cigars of the value of $250, and also furniture used in conducting the hotel, not the private household furniture of Carrel, of the same value. Plaintiff, claiming to own the chattels used by the judgment debtor in conducting the hotel, took those not set out as exempt by a writ of replevin. The replevin suit coming on to be tried, a verdict and judgment for the value of the chattels taken in the replevin suit was rendered for defendant. Plaintiff moved for a new trial, which was denied.

Testimony on the part of plaintiff tended to prove that on April 27, 1908, Isaac W. Carrel occupied and had occupied from May 1, 1906, a certain hotel at Caledonia, Kent county, in which he kept a bar or saloon. The hotel was the property of plaintiff, and Carrel was its tenant. Carrel owned the hotel furnishings and the stock of liquors and cigars. Notice to quit or pay the rent, which was $1,200 a year, had been given to Carrel, March 9, 1908. There was a conference at which the sum due and owing from Carrel to plaintiff was agreed to be $1,500. Four instruments, dated April 27, 1908, were executed.

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By the terms of one of them Carrel and his wife sold and transferred to plaintiff the hotel furnishings and utensils for a stated consideration of $1,500. They also conveyed to plaintiff by warranty deed certain real estate at Dorr in Allegan county. The consideration stated in the deed was $1,500. A lease of the hotel for one year from May 1, 1908, for a rental of $55 per month, was executed by the plaintiff and by Carrel. An agreement was made, reduced to writing and executed by plaintiff and by Carrel and his wife, by the terms of which plaintiff agreed to sell to Carrel the hotel furnishings and utensils described in the bill of sale for the sum of $1,500, to be paid at the rate of $30 per month, in advance, on the first of each month, beginning May 1, 1908, and continuing until the said principal sum and interest at the rate of 6 per cent. per annum, payable annually, had been paid. The agreement concludes as follows:

"Said parties of the first part hereby agree to keep the said property insured for the benefit of the said party of the second part in the sum of fifteen hundred dollars; the loss upon which said insurance, if any, shall be payable to the said Grand Rapids Brewing Company. It is further agreed and understood that said party of the first part shall have the privilege of paying the sum of more than thirty dollars per month to be credited to them upon this contract; and it is further agreed that upon the fulfillment of this contract and payment of the sum of fifteen hundred dollars, together with interest thereon, the said Grand Rapids Brewing Company, the said party of the second part, will also deed and convey over to the said party of the first part certain premises in the village of Dorr, county of Allegan, which have been heretofore deeded by the said parties of the first part to the said Grand Rapids Brewing Company."

It appeared from plaintiff's books of account, and from the testimony of plaintiff's witnesses, that prior to January, 1904, Carrel and his brother had carried on a hotel business at Dorr, in Allegan county, upon premises owned by them in common; that plaintiff advanced to Carrel to purchase the interest and property of his brother at Dorr

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the sum of $3,000. The hotel property, then estimated to be worth $6,000, was deeded to plaintiff, which gave to Carrel a contract agreeing to sell the property to him, and he agreeing to buy the same for $3,700. The $700 represented a joint note of Carrel and his brother which Carrel agreed to pay, and which was surrendered. An account was opened by plaintiff with the Dorr property. The hotel was destroyed by fire in 1905, and was rebuilt; plaintiff contributing some money. Plaintiff received from insurance on the hotel the sum of $3,090 and from Carrel $335 and advanced him $356.43. The property was later sold to one Sturm for $3,000, which, with the insurance moneys, was credited to Carrel in the account. After the sale of the Dorr property, Carrel leased the hotel at Caledonia, Kent county, and purchased the furnishings and stock at the hotel and in the bar, the furnishings for $1,600 and the stock and supplies for $1,350, a total of $2,950. This sum was paid by the plaintiff and charged against Carrel in the Dorr property account. It further appeared from the testimony given by plaintiff's witnesses that in August, 1907, Carrel was sued by Lena Liebler for damages resulting from the alleged illegal sale of liquors to her infant son, and that in January, 1908, a suit of similar nature was begun against Carrel by one Herp; the charge being an illegal sale of liquor to Herp's daughters. The trial of the *Liebler Case* resulted in January, 1908, in a verdict and judgment of $900 for plaintiff. A new trial was granted, and upon the second trial, in April, 1908, there was a judgment for defendant. This judgment was reversed, and a new trial ordered. 155 Mich. 196 (118 N. W. 975). Costs upon reversal were awarded to the appellant, and it was a writ issued out of this court, directed to the sheriff of the county of Kent, commanding him to make the sum of $222.40 out of the goods and chattels of Isaac W. Carrel, which the defendant in the case at bar was executing when he was interrupted by the service of the writ of replevin.

A demurrer in the *Herp Case* was overruled April 29.

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1908. Herp has since recovered judgment against Carrel and, we assume, the sureties upon his liquor bond. Carrel had been and was a customer of plaintiff, which carried on its books an account with him for keg beer and one for bottled beer. There was testimony, all of it from plaintiff's witnesses, tending to prove that plaintiff since some time in 1904 had an intimate acquaintance with the affairs of Carrel, had on one occasion deeded real estate at Caledonia to a person to enable him to become a surety for Carrel on his liquor bond, the surety later reconveying the real estate to plaintiff. No money was paid for either conveyance. It had indemnified at least one other surety.

For defendant, testimony was produced tending to prove that the instrument conveying to plaintiff the hotel chattels was not recorded or filed with the township clerk; that Carrel in May, 1908, advised the supervisor that his assessment ought to be as it had been the year before ($2,000); that he had no other personal property in the township except that contained in the hotel; that he was assessed in 1908 for personal property and paid the taxes thereon for that year. He proved the judgment of the Supreme Court, but did not prove the fact of the taxation of costs other than by the recital in the writ of *fieri facias*.

1. It is a contention of the appellant that the undisputed evidence shows a state of facts which entitled plaintiff to have a verdict directed in its favor. The contention cannot be sustained. There was testimony which tended to prove that both the plaintiff and Carrel and his wife regarded the arrangement of April 27, 1908, not as the payment and extinguishing of an indebtedness, but as one securing payment of an existing and continuing indebtedness. The instruments which were executed are themselves some evidence that, as between the parties to them, security was intended to be taken and given. It is true they contain no undertaking of Carrel to pay; but the contract for a resale of the personal property does contain a defeasance with respect to the conveyance of the real estate when-

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ever the sum of $1,500 and interest thereon should be paid.

There is also testimony warranting, if not requiring, the inference that, whether the arrangement was a sale or a mortgage, the purpose of plaintiff was to continue in business a customer who was threatened with financial reverses, to secure itself and still to leave the debtor in the apparent position of an owner of the property in his possession. The stock of liquors and cigars was mortgaged and had been since the previous December. The mortgagee, an attorney of Grand Rapids, was upon various occasions employed by the plaintiff and had been and was attorney for Carrel in some, if not all, of the pending litigation. He prepared the papers executed April 27, 1908, was present at the conference at which it is claimed an adjustment of accounts was made, and he represented the plaintiff and himself in a conference with the defendant after the levy had been made. He advised or told Carrel that he was entitled to exemptions both from the stock of liquors and cigars and from the hotel furnishings, and assisted him in securing them from the defendant sheriff. He replevined the stock of liquors and cigars not set out to Carrel as exempt. His intimate relations with Carrel and with plaintiff indicate that plaintiff had accurate knowledge of the precise financial condition of Carrel and of the litigation which threatened him. It appeared from the testimony of this witness that after the trial of the *Liebler Case* had been postponed at the December, 1907, term of the circuit court, upon his application, he prepared for Carrel a deed of the Dorr property and a bill of sale of these chattels to his (Carrel's) wife, conveyances which were ignored when the arrangement of April 27th was made.

Treated as a sale, the transaction of April 27, 1908, in so far as it related to the personal property, was presumptively fraudulent (3 Comp. Laws, §§ 9520, 9521) as to creditors of the vendor, who are all persons who shall be creditors of the vendor at any time while such goods and chattels shall

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remain in his possession or control. The jury were warranted in finding that the arrangement of April 27, 1908, was not a good-faith arrangement made without intent to defraud creditors or those who were likely to become creditors during the continuance of the arrangement.

2. Complaint is made of the conduct of the trial judge in questioning the plaintiff's witness Newnham. It is said he indicated to the jury his opinion concerning disputed facts, asked the witness to state a legal conclusion, assumed that the witness had testified to certain facts when he had not done so, assumed without right that, if the hotel furniture belonged to plaintiff, Carrel would have no right to claim exemption from the execution levy, assumed that acts of Carrel subsequent to the arrangement of April 27, 1908, could be given in evidence against plaintiff.

There is no merit in the criticisms which are made. There can be no doubt about the attitude of the witness on the Monday following the levy when he went to Caledonia. He represented the plaintiff. The fact that he was also personally interested does not change the situation. He was not personally interested in the hotel furnishings. He advised, or told, Carrel that he had the right to demand exemptions out of the hotel furnishings which had been seized. The questions propounded by the court to the witness called for his (witness') theory of the right of Carrel to claim as exempt property which belonged not to Carrel but to plaintiff. An argument is made in this court upon the proposition that Carrel had the right to the exemption growing out of his possessory and contract rights. The proposition is not involved here. Whatever property defendant seized was either taken on the writ of replevin or was set out as exempt. The property was not moved. At the conclusion of the somewhat extended colloquy, the court said to counsel for plaintiff:

"Neither of you have answered the question I have asked as yet. I have charged the jury right now that, in the absence of acquiescence on the part of the brewing

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company or their representatives, anything that Mr. Carrel may have done would not be binding upon them so far as their rights and interests in this property are concerned. It only bears upon the question of what the brewing company and Mr. Carrel were doing in conjunction, if anything at all. That is what I wanted to know."

When it is considered that the business in which Carrel was principally engaged must have been the conducting of a hotel with a bar, or else either the hotel business or the saloon business, and that Carrel was claiming and took exemptions or one exemption of twice the value of goods permitted by the statute, with the knowledge, consent, and approval of the representative of plaintiff, it does not appear to us to be reprehensible conduct on the part of the court to make the inquiry which he did, with the caution and advice to the jury which he gave.

3. It is contended that defendant should have proved that the costs of Mrs. Liebler had been taxed in the Supreme Court. We do not see how the point concerns the plaintiff in replevin. The property seized was in the possession of Carrel, and the writ runs against Carrel. Plaintiff's right to interfere depends upon its having the title to or right to the possession of the property which was seized.

4. Conduct of Defendant's Attorney in the Course of the Trial. The matters argued in the brief under this head are most of them, in fact, objections to testimony elicited upon the cross-examination of the plaintiff's witnesses, as to much of which no objection was made at the trial. The good faith of the plaintiff was in issue. In such cases the extent to which cross-examination may be carried must be determined by the trial judge. It is only when an abuse of discretion is made out that reversible error will be found. No abuse of discretion is made out here. The relevancy of the testimony indicating that a third trial of the *Liebler Case* had occurred after the rights involved here had become fixed is not apparent, and counsel for defendant should not have called for the

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testimony. It is not perceived how it could have prejudiced plaintiff with the jury.

During the cross-examination of plaintiff's witness Newnham, the following occurred:

"*Q.* Now, Mr. Newnham, when you were there at the brewing company on these different occasions in April, just prior and during the time that the *Liebler Case* was being tried the second time, which, according to the records there, began April 17 or 16, 1908, isn't it a fact that you arranged with the officers of the brewing company to invite the whole jury panel to the brewing company to look over their plant?

"*A.* No, sir.

"*Q.* Didn't you know that the jury went up there at the invitation of the brewing company?

"*A.* I don't know anything at all about it.

"*Q.* Will you swear they did not?

"*A.* I don't know anything about it. It is the first intimation I heard anything about this.

"*Q.* Don't you know it was done in that case?

"*A.* I do not, Mr. Geib.

"*Q.* Didn't you talk it over?

"*A.* No, sir.

"*Q.* And arrange with them with the officers of the brewing company?

"*A.* No, sir; I did not. No such thing ever happened as I know of.

"*Q.* But there was a verdict of no cause of action in that case?

"*A.* There was; yes.

"*Q.* Which was afterwards reversed by the Supreme Court?

"*Mr. Maher:* Counsel should be sure that he has a proper foundation before he asks such questions as that.

"*Mr. Geib:* Well, I will produce what I have if you want to know about it."

Plaintiff's witness Tusch was interrogated in a very similar manner. The answers of both witnesses were entirely favorable to themselves and to the plaintiff, and defendant offered no testimony upon the subject. No objections were made and no exceptions were taken to the cross-examination above set out, nor were objections

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made to the cross-examination of the witness Tusch until after answers had been given. It is the contention of plaintiff that this conduct of counsel for defendant, whether objected to or not, is of a character demanding the reversal of the judgment and a new trial. It is possible that, if objections had been made and answers excluded, the situation would have been less favorable to plaintiff. If the fact asked for was supposed to exist, it could be relevant to the issue only upon the theory that plaintiff and Carrel, one of the defendants in the *Liebler Case*, were acting in concert in an effort to defeat Mrs. Liebler's demand at about the time the plaintiff received its bill of sale from Carrel, a conspiracy to which the attorney for Carrel, sometimes also the attorney for plaintiff, was a privy. If the fact called for was not supposed to exist, the conduct of counsel for defendant was most reprehensible. His answer to the admonition of counsel for plaintiff was in any event insinuating and improper, plainly intended as an affirmation that there was in fact a proper foundation for the interrogatories. We have concluded that as counsel for both parties accepted the answers of the witnesses, as the trial court was not asked to interfere, and as the alleged misconduct was not made a ground for the motion for a new trial, we may assume that the jury also accepted the answers of the witnesses as they should have done. We reach this conclusion the more readily because we are of opinion that the undisputed testimony required that a verdict be returned for the defendant.

All of the assignments of error relied upon have been examined. None call for more extended discussion, and none call for a reversal of the judgment.

The judgment is affirmed.

HOOKER, MOORE, MCALVAY, and STONE, JJ., concurred.

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KAUKOLA v. OLIVER IRON MINING CO.

1. MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—LIGHTS.
   Testimony that an electric light, placed near an aperture in a mine shaft, was not burning after the plaintiff was injured, and that the bulb had been broken, tends, although contradicted, to prove a material question of fact in an action for negligent failure to provide proper illumination.

2. SAME—DUTY TO PROVIDE PROPER LIGHTS.
   A question of fact as to the purpose of such light is presented by testimony of superior servants of the defendant that it was provided so that the men might walk with safety, and to protect them.

3. SAME.
   The duty to maintain proper lights in a mine so that employés in getting to and from work might avoid a dangerous opening in a level arises from the nondelegable duty of the master to provide a safe place.

4. SAME—ASSUMED RISK—CONSTRUCTIVE KNOWLEDGE.
   Under uncontradicted evidence that the servant did not know of a dangerous opening in a dark portion of the mine in which he was employed, that the hole was not much more than a foot in apparent width when seen from certain positions, and was improperly lighted, raises a question of fact for the jury as to his constructive knowledge of the danger.

5. SAME.
   The servant would be held to have assumed the risk if the opening was such as would not escape ordinarily careful observation.

6. SAME—SAFE PLACE.
   The employer must furnish a suitable place where the servant, with due care, may perform his work without being exposed to any but the ordinary dangers of his occupation.

7. SAME—ASSUMED RISK.
   The servant is not bound to familiarize himself with all the machinery and appliances which he does not use himself.

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8. SAME—PRESUMPTIONS.

The servant has a right to presume that his safety has been reasonably provided for, and, in general, may use a walk or appliance without first particularly inspecting it.

9. SAME—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.

Whether the absence of sufficient light was the proximate cause of the servant's injury, and whether he was guilty of contributory negligence, were questions of fact.

Error to Gogebic; Cooper, J. Submitted January 19, 1910. (Docket No. 92.) Decided February 3, 1910.

Case by Eino Kaukola against the Oliver Iron Mining Company for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

P. H. O'Brien and *George O. Driscoll*, for appellant.

Charles M. Humphrey and *R. C. Flannigan*, for appellee.

STONE, J. This is an action on the case brought and tried in the Gogebic circuit to recover damages for a personal injury received by the plaintiff about 10 o'clock on the night of April 4, 1907, while employed by the defendant in the Aurora iron mine at Ironwood, which was operated by the defendant. There was a jury trial, and at the close of all the evidence, upon the defendant's motion, the circuit judge directed a verdict for the defendant, and a judgment followed accordingly. The case is brought here by the plaintiff upon writ of error.

We have discovered in the record no reversible error in the introduction of evidence, and shall only consider the assignments of error relating to the direction of the verdict.

A brief statement of the conditions in the fifteenth level of the mine, where the injury occurred, and of the employment of the plaintiff, will be sufficient. The ore vein and drifts in this mine run easterly and westerly. There were

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17 levels, numbered downwards from 1 to 17, inclusive. There were two shafts, known as "A" and "No. 1," which connected with the main or foot drift of the fifteenth level near its westerly end. This foot drift was nearly a mile long, was timbered with sets of eight-foot upright posts and eight-foot caps, and lagging behind, as mine drifts usually are. There were crosscuts leading off from this drift. Car tracks of 25-pound iron rails and 2-foot gauge were laid on cross-ties along the middle of this foot drift, and there were a number of crosscuts with switches at the crosscut entrances. Trolley wires were installed therein above the tracks to furnish power to electric motor cars which were operated thereon. Push cars, used in conveying timber and moved by hand, were also run on these tracks. The motor cars had no certain meeting points, and had the right of way, and the timbermen were required to not interfere with their operation. These motors had gongs and headlights, with reflectors on each end. The motors were used for handling rock and ore, and were each manned with a driver or "motorman" and a helper, called a "swamper." As we understand the record, there were two motors operating in this drift, and each made 25 trips, more or less, per shift to the shafts, hauling trains of three or more cars each trip. There were two switches some distance east of shaft No. 1, called switches 48 and 24, the 48 switch being closest to the shaft. Before February, 1907, the defendant had constructed a raise—called in this record a "chute"— in the foot drift of this mine on the fifteenth level directly under the track and between switch 48 and switch 24, vertically from the floor of the foot drift of said fifteenth level, a distance of 75 feet downward to the sixteenth level of said mine. Said raise was so constructed as to leave an opening in the floor of said drift from 12 to 18 inches wide by 7 feet long on each side of said track, and in such a manner as to leave but one means of passage over and across said raise; that being along and upon said car track between the rails on which a pathway was constructed with plank between

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the rails, the rails being two feet apart. There was evidence tending to show that the raise before the track was laid over it, and the space between the rails was covered, was 7 feet by 4 feet—that was the cribbing of the raise. It was claimed by the plaintiff that from the time of the construction of said raise and up to the time he was injured the defendant had customarily and in fact constantly kept and maintained in this foot drift electric lights of 16 candle power at the switches, and one over this raise or chute, which was of material assistance in determining the location of the raise to such persons as had occasion to use this track as a passageway; that between 48 switch and the raise was a water ditch on the southerly side of this two-foot railway track, in which water continually ran and descended with considerable noise to the sixteenth level; that on the north side of the track between 48 switch and the raise was an air pipe along by said raise.

The plaintiff was born in Finland, and was 22 years old in January, 1909. He came to this country in April, 1905. During the first year he was here he worked three months as a section hand repairing railroad, and about eight months in the woods, cutting and skidding timber. He then worked in the East Norrie mine a few days, tramming. After that, and in the first part of May, 1906, he went to work in the Aurora mine, and worked nearly half a year as a timberman and filling cars on the fifteenth level. He knew where the said foot drift was, and was in it while he worked there during 1906. He testified that he did not know at the time where the switches known as 48 and 24 switches were. He knew that there was not any raise leading from the floor of the foot drift to the sixteenth level of the mine between 48 and 24 switches at the time he worked there in 1906. After working at this Aurora mine about half a year, he went back and worked in the East Norrie, and he worked at the last-named mine up to March 19, 1907, as timberman; it being his duty to help the miners bring in the timbers, lagging, etc. On March 19, 1907, he went to

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work a second time in the Aurora mine. Two or three of his comrades went with him to the Aurora.

He testified:

"Capt. Thomas hired us to work in the Aurora when I went there last. * * * I went to work that evening. After I left the dry house, I walked to the cage shaft, and went down to the fifteenth level. We waited for the boss to give us directions where to go to work. Several of us belonging to the same timber gang were to work together. Those were the men that came in with me from the East Norrie. * * * We followed the man and started to walk east in the drift, the main drift, the foot drift. We walked east in the foot drift, quite a long distance. I thought it was almost a mile. I walked with the boss, right behind him. We walked through the drift, and presume passed the chute, into which I afterwards fell. The boss did not call my attention to the chute, or tell me it was there, or anything. While we were walking through the drift, I was walking as near to Mr. Caddy as one man can walk behind each other. He put me at work timbering. I could speak just a few words, poorly, of English at that time. The nature of my duties was to bring the timber and lagging and cribbing to the miners. The boss and the miners told me where to get them. There were four men working in my crew. They were all Finns."

The plaintiff, referring to the circumstances of the injury, testified:

"I was working in the Aurora mine on the 4th day of April, 1907, at those same duties, night shift. I went to work that day at the usual time, just a little before 7. All of the members of my crew were not present that night. There were three present. We did what the boss told us. He told us to bring timber near the fourteenth level. We were working on the fourteenth level at that time. After he told us, he took one man away from our gang. I told him it was rather hard work for two men to do. I didn't know that boss' name any better than I used to call him 'Jack.' That just left my partner and me in the crew. The timbers that were used up in that part of the mine were gotten near the 'A' shaft, or cage shaft, on the fifteenth level, and to take them up on the fourteenth level we had to take them up on a truck to the place where

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they were hoisted up on the fourteenth level through the foot drift on the fifteenth level. According to my estimation, we had to take them east through the foot drift nearly one-half a mile. We had to take them very much east of the place where I fell in the chute. When the boss told me to go out and get this timber, my partner, Oscar Maki, and I went. * * * We were there on a sublevel between the fourteenth and fifteenth levels. After we started after the timbers, I saw another boss, Mr. Caddy, at the following switch after 48 switch. * * * I tried to explain to him that there were only two of us that were ordered to bring and set the timbers in. He said that we had better try to do it. He didn't say anything else to us at that time. He just told us to go ahead and get them. He didn't say anything about the chute. He didn't say anything about the light over there. After we talked to him, we commenced to walk towards the shaft, and we walked near to No. 1 shaft, where we took the truck. We didn't have the truck till we got to No. 1 shaft. We then went to 'A' shaft. Then we commenced to pick up such timber as we thought necessary out there, and then we put it on the truck, and commenced to go towards the place where they were needed—that was east. We met Mr. Caddy by No. 1 shaft, and asked him what chance he had to go in. We asked him that because we couldn't always go in on account of motors being inside. They were working there —going in and out—and we had to keep out of the way of the motors. He told us to wait a minute until the motor came out, and then go in."

He then described the manner of their waiting for the motors to pass, going upon the side track, etc., and continued:

"We had timbers called drift timber loaded on that car, about 7 feet long, and a foot or more thick. I can't remember whether they were green or dry timbers. We had three timbers on the car. The car was about three feet wide anyway, and our load of timber was anyway over three feet wide. The car had four wheels, and that time it was very hard to push, it was very heavy. We were pushing the car with our hands and putting our shoulders to it, propelled it along. My partner was walking on the right side of me in the bottom of the drift. After we left 48 switch, he walked inside the track, between the rails,

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and I walked outside of the rail on the left side. That would be on the north side, I think. I didn't walk between the rails, too, because there was no room for two; that is, side by side for two. We had both candle lights with us at that time, which we kept in the rear of the car on the timber. We had a candlestick made of iron that we stick into the timber. We put it on the rear end of the timber so that it would not blow out, and, if they went out, we could easily light them again. I don't think they would stay lighted on the front end of the timber, because there was a good deal of draught. It would easily blow out the light. After we started east from 48 switch with our car of timber at that time we pushed the car very hard, we were in a hurry to get out of the way of the motor because we heard the bell ring, and I cannot describe exactly the minutes, but all at once I fell down. I did not know myself where I fell. I thought I fell very far, but I did not know how far I fell down. I did not lose my senses when I fell. I cannot describe to the jury how I fell better than that I fell down and went to the bottom of the hole. I fell with my feet down. I was trying to hold myself this way as I went down—spreading out my arms. Then I fell down in a sitting position. I will illustrate to the jury just how we were pushing the car at the time I fell. I had my leg in this position (indicating), and my shoulders I had towards the timber, and I was pushing the car in this way (indicating). I was braced against the timber with my feet back from under it, my feet braced."

He then described the nature and extent of his injury.

On cross-examination the plaintiff testified that he did not know the hole into which he fell the night he was injured was there before the time he fell into it; that he had never been told by any one that there was such a place in the foot drift in the fifteenth level. We gather from his testimony that he does not claim to know whether or not there was a light over the raise at the time he fell into it. But he testified that there was none there when he was brought up after the injury. He further states that he made about three trips a day over this raise; that, when he went to the fourteenth level of the mine, he went down "A" shaft to the fifteenth level, and from there he walked

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east through the foot drift, and then up the ladder to the sublevel of the fourteenth, and each time passed the place where he fell in, and repeated the same when he came back.

The evidence upon the trial was conflicting as to whether or not there was an electric light at the raise at the time of the plaintiff's injury, and we think it a material question as to whether the light was burning at the raise at the time the plaintiff fell into it. The witness Victor Maki testified that he was at work on this night at this place; that he and two other men dumped rock in the raise in question the night plaintiff was hurt, on two occasions, about 8 or 9 o'clock, and that he went by the raise that night after plaintiff was hurt, and that he did not see any light over the raise up to midnight. He claims that he is sure of that because there was a good deal of talk about it. He is positive that there was no light there when he dumped the car before plaintiff was hurt, and claims that he noticed it was gone when he dumped the first car. He further testified that there had been a light kept there previous to that night on that chute or raise.

There was also evidence showing that this light had been broken in the afternoon, about 2 or 3 o'clock, and a witness testified that he saw the bulb broken, and described the manner of it. Robert Lindberg also testified that there was no light over the raise that night. He claims that he learned there was no light there a little after 7 o'clock in the evening. He further testified that he saw the socket without the light, and the reason that he missed it was because he could not find the tally board that was used to mark the number of cars that were emptied. He further testified that he spoke to Mr. Caddy about the light being gone that evening at about half past 7, and details the conversation. This is denied by Mr. Caddy, and it is the claim of the defendant that there was an electric light burning at the raise all that night, and at all times, and a number of witnesses so testified.

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1. In our opinion this testimony raised a question of fact for the jury.

In *McDonald* v. *Railway Co.*, 105 Mich. 659 (63 N. W. 966), the question was whether certain bars were up at 4 o'clock. One Brearly testified that they were. Justice MONTGOMERY, speaking for the court, said, after reciting the testimony:

"I think it very clear that this testimony raised a question of fact for the jury. It is true that the defendant's witness testified that the bars were up at 4 o'clock on the 7th, but there is no testimony that there was anybody whose duty it was to put them up after 1 o'clock on the 7th, when the witness England testifies they were down. This testimony clearly tended to impeach the recollection or veracity of the witness Brearly. According to his testimony, the bars could not have been down except on very rare occasions, whereas the other witnesses testified that the bars were left down constantly. * * * In my judgment it was for the jury to say whether his positive testimony that they were up on the 7th should be accepted in view of the fact that his testimony upon this question of their being up at other times during the summer was so directly disputed by the testimony of other witnesses."

2. Were the lights kept at the switches and at this raise for the benefit of the employés of the mine, and to enhance their safety? In the argument at the hearing, defendant's counsel took the position that these lights were not intended for the security of the workmen. There was testimony upon that subject as follows: Andrew Vronch, one of defendant's witnesses, among other things, testified:

"I had nothing to do with putting the lights in. That was the business of the electricians. It was their business to put back a light if it was out. If a light went out on the night shift, a lamp burned out, they have to get some lights extra. Then the captain—the foreman—or the motorman put them in. * * * If the motorman put a lamp over the chute or any place, he would be just doing that of his own free will. The only ones whose business it was to do it was the electricians. It was their business

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to see that lamps were kept burning, and on the night shift it was the business of the boss and the motorman. They kept the lamps burning there to show the men how to walk in the raise, in through, was the reason they kept them there to make it good and safe to walk along.

"*Q.* Because if there was no lamp there a man might walk into a hole, is that true?

"*A.* Why, sure; he might walk in a hole. A fellow could see from one light, or might see from one light to another."

This man had testified on direct examination that the light was kept at the raise to show the men where to walk. Hart Caddy, the shift boss of defendant, testified, on cross-examination, as follows:

"*Q.* And you just testified that there was a light there that night because that was your general habit, and you depend upon that?

"*A.* Well, it is my general habit, and, if there was a light out in passing through, we certainly would notice it. I always notice that, because that was part of my business. I had to look out for the lights and raises, switches, and such things, and I was the only man on the fifteenth level at that time whose duty it was to do that—to look after the lights. And that is why I am so positive about the fact that the light was there.

"*Q.* Did defendant impose that duty of keeping the lights there for protection of the men upon you?

"*A.* Well, that is the electrician's through the day, the same as I said before. On the night turn, we look out for them at such places as switches and raises where they are most necessary. I see that they are there. The company expects me to do that for the safety of the men. They expect us to see that we carry that out. That is a part of my duty as shift boss. * * * It is my duty to look after the lights on the fifteenth level. I was the only one that that was imposed upon. I looked after the lights and the motormen, and was the only one on the fifteenth level. Well, there are five of us, but I was on the fifteenth level; yes, sir. I was the only boss on the level, and the only one that was appointed to look after the lights for the safety of the men. Yes, sir; for the safety of the men."

We are of the opinion that this evidence tended to show that the light had been placed and kept at the raise by

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the defendant for the safety and security of the workmen. At least, that question became one of fact for the jury, under the evidence. The raise was a dangerous place.

3. If this was the duty of the defendant, does the doctrine of fellow-servant apply, and can it be said that the matter of the failure to keep the raise lighted was simply the neglect of Caddy, the shift boss, who was the fellow-servant of the plaintiff? The lighting of this passageway or thoroughfare of the mine, far distant from the working places of most of those who passed through them—it being always dark in the mine—was just as necessary for the safety of the men, as it was to have the walls and floors in a proper condition. It was one of the "instrumentalities" which it was necessary to provide to enable the men to do their work, and to get to and from their work safely. It was a thing which it was necessary to keep permanently in condition. Unlike the case of *Livingstone* v. *Plate Glass Co.*, 146 Mich. 236 (109 N. W. 431), here the place furnished was a permanent place of work, and not one where the conditions were constantly changing. Here, in our opinion, the rule of a safe place to be furnished by the master applies. In *Cristanelli* v. *Mining Co.*, 154 Mich. 423 (117 N. W. 910), it was held that the engineer of a mining hoist, in so far as it is his duty to keep the place safe, is not the fellow-servant of an employé engaged in loading machinery upon the skip at the collar of the shaft. In *Beesley* v. *F. W. Wheeler & Co.*, 103 Mich. 211 (61 N. W. 662, 27 L. R. A. 266), Justice MONTGOMERY, in a concurring opinion, said:

"The rule that it is the duty of the master to furnish a safe place for the servant to work is so universal, and so thoroughly settled, that no citation of authorities is necessary to sustain it. It is also settled in this State that this duty is one which cannot be delegated by the master so that the employé engaged to do the work of making the premises safe is to be treated as a fellow-servant of those who are employed and engaged in the general work for which the premises are intended"—citing *Van Dusen* v. *Letellier*, 78 Mich. 492 (44 N. W. 572); *Brown* v. *Gil-*

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christ, 80 Mich. 56 (45 N. W. 82, 20 Am. St. Rep. 496); *Roux* v. *Lumber Co.*, 94 Mich. 607 (54 N. W. 492); *Morton* v. *Railroad Co.*, 81 Mich. 423 (46 N. W. 111).

See, also, *Sadowski* v. *Car Co.*, 84 Mich. 100 (47 N. W. 598); *Town* v. *Railroad Co.*, 84 Mich. 214 (47 N. W. 665); *Fox* v. *Iron Co.*, 89 Mich. 387 (50 N. W. 872); *James* v. *Mining Co.*, 55 Mich. 335 (21 N. W. 361).

The rule is well stated in Baldwin on Personal Injuries (2d Ed.), §§ 386, 388, as follows:

"The master must provide his servant with a safe place in which to work, and furnish him with suitable machinery and appliances with which to perform such work, and it is his duty to keep such machinery and appliances in good repair. If he cannot do this himself personally, he must provide some other person to take his place in this respect; and the person to whom the master's duty is thus delegated—no matter what his rank or grade, no matter by what name he may be designated—cannot be a servant in the sense or under the rule applicable to injuries caused by fellow-servants. Such a person is an agent, and the rules of law applicable to principal and agent must apply. He is generally called in the law a vice-principal. In order to keep the machinery and appliances safely in repair, the law makes it the duty of the master to make all needed inspections and examinations; and he cannot escape responsibility by delegating this duty to one who in other respects may be a fellow-servant of the person injured by the failure to properly perform his duty. * * *

"The weight of authority holds that the duty of inspection cannot be delegated, or the responsibility therefor shifted from the master, and that whenever the duty of inspection is placed upon a servant, whatever may be his grade or rank, he is to that extent a representative of the master, though in all other respects he may be a fellow-servant."

In *Anderson* v. *Railroad Co.*, 107 Mich. 592 (65 N. W. 585), and in *Balhoff* v. *Railroad Co.*, 106 Mich. 607 (65 N. W. 592), it is held that sectionmen, in so far as they have the duty of keeping the track in repair, are not fellow-servants of the trainmen.

In *Knapp* v. *Railway Co.*, 114 Mich. 199 (72 N. W.

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200), and in *Fluhrer* v. *Railway Co.*, 121 Mich. 213 (80 N. W. 23), where brakemen received injuries from holes in a defective track bed, the same holding was made.

In *McDonald* v. *Railroad Co.*, 108 Mich. 8 (65 N. W. 597), where a brakeman was injured by a defective coupling on an engine, it was held that the engineer whose duty it was to inspect the couplings, etc., on his engine, was not in that respect a fellow-servant of the brakeman.

In *Thomas* v. *Railroad Co.*, 114 Mich. 59 (72 N. W. 40), where a section foreman in selecting a rope for the use of his men was held not in that respect a fellow-servant with them; but was a fellow-servant in so far as using the rope was concerned.

In *McDonald* v. *Railroad Co.*, 132 Mich. 372 (93 N. W. 1041, 102 Am. St. Rep. 426), it is held that the car repairer, whose duty it is to inspect the cars, is not in that respect a fellow-servant of a conductor. This brings us to the general question of assumption of the risk.

4. Did the plaintiff assume the risk? The doctrine of assumed risks of servants applies, and is limited in application, to dangers which the employé either knew or should have known. The evidence in this case may be said to be undisputed that the plaintiff did not know, as a matter of fact, of the existence of the raise. Therefore, upon this branch of the case, the only question is whether, as a matter of law, it can be said that he should have known. The learned circuit judge charged the jury as follows:

"Now, it seems to me that this case falls clearly within the cases that, where a dangerous place is apparent and obvious, the servant is bound in law to observe it. He has had an opportunity of doing so, and certainly a man, as the plaintiff did in this case, passing this chute or raise as many times as he did, could not help but have the opportunity of seeing it. I am forced to that conclusion the more that I have looked over the authorities. It seems to me that it falls absolutely within the cases that hold that a servant assumes all of those risks that are apparent to him if he has an opportunity to observe them for

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himself. In this case the plaintiff certainly had such an opportunity."

An inspection of the record will show that there was a conflict in the evidence as to the appearance of the hole or raise. It is the claim of the defendant that it was open and obvious to any passerby. But taking into consideration the surroundings, and that there is some testimony which does not make the opening upon the north side wider than one foot when looking down upon it, and that the timber underneath had been cut off slantingly to enlarge the entrance horizontally, it may well be doubted whether this hole was so apparent, and apparently dangerous, as is claimed by defendant. In order for the defendant's contention to prevail upon this point, it should appear that this hole was so apparent that it must have been obvious to a person of ordinary prudence and care in the employé's situation. That is, it must be such a defect or hole as would not escape ordinarily careful observation. *Lamotte* v. *Boyce*, 105 Mich. 545, 548 (63 N. W. 517); *Bauer* v. *Foundry Co.*, 132 Mich. 537 (94 N. W. 9):

"Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk." *Narramore* v. *Railway Co.*, 96 Fed. 301, 37 C. C. A. 501.

The employer must furnish a suitable place where the servant, with due care, may perform his work without being exposed to any but the ordinary danger of his occupation; and the servant will not be bound to familiarize himself with all the machinery or appliances which he does not use himself. The servant has a right to presume that his safety has been reasonably provided for, and in general may use a walk or appliance without first particularly inspecting it. See *Clark* v. *Cement Co.*, 138 Mich. 673 (101 N. W. 845), where the loose plank in the walk threw decedent into the machinery. Also *Nichols* v. *Railroad Co.*, 145 Mich. 643 (108 N. W. 1016), where it

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was held that defects in a 35-foot ladder on the side of a tank, only occasionally used, need not be discovered by a workman who uses it, even though ordinary care and inspection discloses them; and it was claimed that it presented a question for the jury.

It was said in *Boman* v. *Iron Co.*, 147 Mich. 178 (110 N. W. 518):

"A person who is employed and instructed to commence work at a particular place is under no obligation, in order to protect himself from a charge of contributory negligence, to first go over a building or plant and make himself familiar with each piece of machinery, and the danger he may incur in coming in contact with it."

And the same rule would apply with reference to the assumption of risk. As was said by Justice BLAIR in *De Kallands* v. *Telephone Co.*, 153 Mich. 25 (116 N. W. 564):

"When there is a possible phase of the case where the risk is not assumed, the trial judge cannot properly direct the verdict on the ground that such risk was assumed."

In our opinion the circuit judge should have left to the jury the question as to whether the risk resulting from the presence of this raise was open and apparent, and was assumed by the plaintiff. We think the question was for the jury under proper instruction, and that the court erred in directing a verdict for the defendant. The questions of contributory negligence, and whether the absence of the light was the proximate cause of the injury, should also have been submitted to the jury.

For the errors pointed out, the judgment below must be reversed, and a new trial granted.

MONTGOMERY, C. J., and OSTRANDER. HOOKER, and MOORE, JJ., concurred.

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INDEX.

ABSTRACT STATEMENTS OF LAW—See TRIAL (1, 2).

ABUSE OF PROCESS—See MALICIOUS PROSECUTION (1).

ACCEPTANCE—See ESTOPPEL (2); PLEADING (1); SALES (10).

ACCOUNTING.

1. It is sufficient in a bill for an accounting, filed by the trustee in bankruptcy of a promoter, that the averments show the promoter was a contract creditor of the defendant corporation, by virtue of an assumption by it of the contract debt of one of its stockholders owing to the promoter. *Kimmerle* v. *Dowagiac Gas Co.*, 34.

2. Insolvency is not a necessary averment of a bill of complaint against a corporation which avers that the complainant's assignor was the defendant's promoter, that it assumed an obligation due to him from its principal stockholder and arising out of his efforts as promoter, and that an accounting is necessary to determine the amount due. *Id.*

See CORPORATIONS (1, 6); EQUITY (1, 2).

ACTION.

1. As a general rule transitory actions must be brought in the county where service of process may be had, which is usually, although not necessarily, the county of residence of the defendant. *Smith* v. *Provident Savings Life Assurance Society*, 167.

2. In the case of resident parties an action must be brought in the county where one of them resides, but where nonresidents are sued, the action lies in any county where process may be served. 3 Comp. Laws, § 10216. *Id.*

3. Under 3 Comp. Laws, § 10015, regulating service of process on foreign insurance corporations, an action may be brought against such corporation in the county of plaintiff's residence, or in any county where service can be had upon a duly authorized agent of the defendant; the statute not being intended however to extend the jurisdiction so as to confer it upon any other court of the State. *Id.*

See ACCOUNTING (2); DEATH BY WRONGFUL ACT (1); MUNICIPAL CORPORATIONS (5); PARTNERSHIP (1-3); TAXATION (2, 4, 5).

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ACTION, ASSIGNMENT OF—See COSTS.

ACTION, CONTINUATION OF—See APPEAL AND ERROR (7).

ACTS OF CONGRESS—See CONSTITUTIONAL LAW (2, 3).

ACTS UNLAWFUL PER SE—See NEGLIGENCE (2).

ADEQUATE REMEDY AT LAW—See EQUITY (1); MANDAMUS (1).

ADJOURNMENT—See CRIMINAL LAW (10); JUSTICES OF THE PEACE (3).

ADMISSIONS—See EMINENT DOMAIN (4); EVIDENCE (26); PLEADING.

ADULTERATION—See FOOD (1).

ADULTERY—See DIVORCE (1).

ADVERSE POSSESSION.

1. Occupancy of an alley by a lumber dealer who piled his lumber, which was continually being changed or removed, partly in the alley and partly on his own land, both being portions of a common at the time of purchase, constitutes a permissive user of the unused public way and not adverse possession, in the absence of a claim or color of title. *Weber* v. *City of Detroit*, 14.

2. To transform a permissive use into an adverse one there must be a distinct and positive assertion of a right hostile to the rights of the owner, and such assertion must be brought to his attention. *Id.*

3. No rights are acquired by the public in land owned by a complainant who built a fence to keep people out of his lumber yard, not on the line of the alley but within the boundary of his own property, and without any reference thereto. *Id.*

See EASEMENTS (1–5).

ADVICE OF PROSECUTING ATTORNEY—See MALICIOUS PROSECUTION (2).

AFFIDAVITS—See APPEAL AND ERROR (14); ATTACHMENT (3).

AGENCY—See EVIDENCE (8); PRINCIPAL AND AGENT.

ALIMONY—See DIVORCE (2, 4, 7, 8).

ALLEYS—See ADVERSE POSSESSION (1, 3).

ALLOWANCE OF CLAIMS—See EQUITY (4); ESTATES OF DECEDENTS (1, 2).

ALTERATION OF INSTRUMENTS—See DEEDS (1); TRIAL (2).

AMENDMENT—See APPEAL AND ERROR (5, 13); CONSTITUTIONAL LAW (6); CONTRACTS (5); CRIMINAL LAW (14); INSURANCE (5).

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ANIMALS.

An instruction to the jury was not error, that if they found the dog was of such vicious character that it might have been known by the defendant, had he exercised reasonable care and attention and should have known of its character, the jury might infer notice to him of its vicious propensities. *Meilke* v. *Schabble*, 163.

See EVIDENCE (8–10); PRINCIPAL AND AGENT (2).

ANTENUPTIAL AGREEMENT—See CONTRACTS (1).

APPARENT AUTHORITY—See PRINCIPAL AND AGENT (3, 4).

APPEAL AND ERROR.

1. A chancery record which consists of a copy of the stenographer's minutes of testimony, including the colloquies of counsel and question and answer, is not in accordance with 3 Comp. Laws, § 10188, requiring that the record be settled as in actions at law. *Andrews* v. *Lavery*, 26.

2. The objection that a plea to a bill in equity setting up the defenses of res adjudicata and of the statute of limitations is bad for duplicity, will not be held decisive on appeal where the point was not made in the trial court. *Andrews* v. *Osborn*, 77.

3. In the absence of a request to the trial court to give its reasons in writing for the refusal of a new trial, no reasons appearing in the record and no exceptions being taken to the refusal, the Supreme Court will not review the action of the lower court in denying a motion for a new trial. *In re Bender's Estate*, 108.

4. On error from a judgment for a defendant who died prior to the settlement of the bill of exceptions, and whose death was not suggested on the record, the court will not review such judgment until a party is substituted whom the judgment of the court would bind. *Courser* v. *Jackson*, 119.

5. The amendment of a bill of exceptions to include an omitted bill of sale on the order of the Supreme Court (*Suchocki* v. *Insurance Co.*, 158 Mich. 62 [122 N. W. 216]), in an action on an insurance policy wherein a verdict was directed in favor of the defendant on the ground that the plaintiff conveyed the insured property by bill of sale to secure a loan, is conclusive of the question whether or not the bill of sale was introduced in evidence. *Suchocki* v. *Calumet Ins. Co.*, 121.

6. An assignment of error that the court erred in failing to submit to the jury the question of waiver of defenses is too general to be considered on appeal. *O'Toole* v. *Ohio German Fire Ins. Co.*, 187.

7. The issuance of a writ of error from the Supreme Court is a continuation of the original cause, not a new proceeding. *Baumgarth* v. *Firemen's Fund Ins. Co.*, 207.

8. A verdict will not be set aside on the ground that it is against the weight of the evidence unless the question was presented

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APPEAL AND ERROR—Continued.

to the trial court on motion for a new trial. *Northrup* v. *City of Pontiac*, 250.

9. After the dismissal of an appeal to the Supreme Court, because the claim of appeal was not filed in time, it is discretionary with the circuit court to extend the time for filing the claim of appeal on terms, and mandamus will not issue to vacate such an extension for cause shown. *Bliss* v. *Saginaw Circuit Judge*, 507.

10. The court will not consider error assigned on the argument of the prosecuting attorney, upon a record which shows no exception or objection made at the time. *People* v. *Giddings*, 523.

11. Where a conditional order is entered permitting the execution of the judgment at law, the appellee must comply with the condition or rely on such protection as is afforded by the appeal bond, which does not continue the protection afforded by the preliminary injunction. *Hulan* v. *Wayne Circuit Judge*, 606.

12. After return is made to a writ of error the Supreme Court has exclusive jurisdiction to entertain a motion to file an appeal bond *nunc pro tunc* to stay proceedings on execution. *Coeling* v. *Barnard*, 634.

13. Appellate courts have power as an incident to their appellate character, on application, to amend an original appeal bond or require a new one. *Id.*

14. The affidavit of plaintiff's attorney, uncontradicted, that the appellant omitted to file the statutory appeal bond because he intended to pay the judgment for costs awarded against him, but had later discovered the defendant was irresponsible and that he could not recover them if he prevailed on error, is sufficient to warrant the court in granting the application. *Id.*

15. It is not an abuse of discretion unwarranted by Act No. 340, Pub. Acts 1907, for the circuit judge to extend the time for filing a claim of appeal in chancery, in behalf of a defendant whose attorney through an error omitted for seven months to file and serve the notice, although he prepared the record from the minutes obtained from the court stenographer and otherwise perfected the appeal in time. *Klotz* v. *Lenawee Circuit Judge*, 689.

See CERTIORARI; CRIMINAL LAW (6); DIVORCE (2, 6); EMBEZZLEMENT (9); EVIDENCE (6, 15, 16, 23, 26); HUSBAND AND WIFE; INJUNCTION (5, 6); JUSTICES OF THE PEACE (1); MANDAMUS (8); NEW TRIAL (1); SALES (13, 14); TRIAL (3–7, 10).

APPEAL FROM JUSTICE'S COURT—See JUSTICES OF THE PEACE (1).

ARGUMENT OF COUNSEL—See TRIAL (6).

ARGUMENT OF PROSECUTING ATTORNEY—See APPEAL AND ERROR (10); CRIMINAL LAW (6, 7).

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ASSAULT AND BATTERY—See EVIDENCE (15); TRESPASS TO PERSON (1, 2, 5).

ASSIGNMENTS—See COSTS; DEEDS (8).

ASSIGNMENTS OF ERROR—See APPEAL AND ERROR (6).

ASSUMPSIT—See TAXATION (1).

ASSUMPTION OF RISK—See MASTER AND SERVANT (2, 3, 8, 9, 11).

ATTACHMENT.

1. Published notice of an action pending in attachment proceedings without personal service, is jurisdictionally defective as constructive service by reason of an incorrect designation of one of two joint defendants as "William H. Dunton" instead of "William H. Denton." *Schoenfeld* v. *Bourne*, 189.

2. Trover lies for the conversion of lumber owned by the plaintiffs, seized in attachment against third parties, and sold by the sheriff without awaiting the levy of execution, the lumber having been transferred to plaintiffs by the purchasers who bought it subject to the terms of a contract which provided for a lien until notes of the purchasers were given; the evidence showing the execution of the stipulated notes. *Belcher-Stine Lumber Co.* v. *Burns*, 466.

3. An affidavit in attachment which describes the defendants named as a copartnership, when, in fact, one of them is not a member of the firm, is not so defective as to deprive the court of jurisdiction. *Id.*

See CREDITORS' SUIT (1); INSURANCE (7).

ATTORNEY AND CLIENT.

1. Proceedings for disbarment are the exercise on the part of the court of its inherent right and power to preserve the orderly administration of justice, and are not actions at law. *In re Radford*, 91.

2. The conduct of every officer of a court is always the subject of supervision and inquiry on the part of the court. *Id.*

3. The Supreme Court has exercised general supervisory jurisdiction in such cases, but has never assumed exclusive jurisdiction. *Id.*

4. An attorney's authority is generally terminated by the death of the client. *Id.*

See CERTIORARI; TRIAL (7).

AUTOMOBILES—See NEGLIGENCE (10–12).

BANKRUPTCY—See ACCOUNTING (1); PARTNERSHIP (5).

BANKS AND BANKING—See EMBEZZLEMENT (5).

BARRATRY—See TRIAL (5).

BILL IN AID OF EXECUTION—See CREDITORS' SUIT (1).

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BILL OF EXCEPTIONS—See APPEAL AND ERROR (4, 5).

BILL OF SALE AS MORTGAGE — See FRAUDULENT CONVEYANCES.

BILLS AND NOTES—See EVIDENCE (18); HUSBAND AND WIFE; PARTNERSHIP (2–4); PRINCIPAL AND AGENT (3).

BOARDS OF SUPERVISORS—See CONSTITUTIONAL LAW (7–11).

BONDHOLDERS' RIGHTS—See FRAUD (2); RAILROADS.

BONDS—See APPEAL AND ERROR (12–14); CONTRACTS (2); CORPORATIONS (2); EVIDENCE (7); MUNICIPAL CORPORATIONS (2, 3, 5); PRINCIPAL AND SURETY.

BOOKS OF ACCOUNT—See EVIDENCE (7).

BOUNDARIES.

1. Riparian owners along the Great Lakes own to the meander line, outside of which the title is in the State in trust for its citizens. *Ainsworth* v. *Munoskong Hunting & Fishing Club*, 61.

2. The name by which a body of water is designated does not determine its character or its relation to the Great Lakes. *Id.*

3. A bay about six miles in length and breadth, known as Munoskong Bay, connected with Mud Lake, from the head of which to Lake Huron is a distance of 24 miles, navigable and practically level with Lake Huron, and having a similar current, is a part of it and not of St. Mary's river; the riparian owners having title to the meander line of the bay. *Id.*

See MUNICIPAL CORPORATIONS (6).

BREACH OF CONTRACT — See PRINCIPAL AND SURETY (2); SALES (7, 8).

BREACH OF COVENANTS—See DEEDS (8, 9, 11).

BROKERS.

No liability is shown to a plaintiff for negotiating a sale of defendant's lands, under testimony that the defendant offered a third person all he might obtain above a specified sum if he should obtain a purchaser, and the third person, without authority, arranged with plaintiff to find a buyer; the defendant not being shown to have given authority to employ plaintiff, or to have known that the latter was acting as his agent. *Benham* v. *Ferris*, 632.

BUILDING RESTRICTIONS—See INJUNCTION (10, 11).

CANCELLATION OF INSTRUMENTS.

1. The court of equity has jurisdiction to cancel a written contract from which a material clause has been omitted by mistake, upon a bill to reform the agreement, to enjoin an action at law on it, and for general relief. *Grand Trunk R. Co. of Canada* v. *Wolcott*, 588.

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CANCELLATION OF INSTRUMENTS—Continued.

2. The objection that the complainant does not come into court with clean hands, because the contract is an attempted restraint of trade, is not sustainable in a proceeding to which the public is not a party, when the agreement merely provides that a siding should be constructed to defendants' mill to connect with the complainant's track and that the defendants should not engage in elevator business in connection with any building on the siding. *Id.*

See EQUITY (7); INSURANCE (1).

CARRIERS.

1. The refusal of a railway company to extend credit for freight charges to a shipper with whom it had had previous difficulty does not constitute an unreasonable disadvantage or prejudice under Act No. 312, Pub. Acts 1907, and does not entitle the shipper to the writ of mandamus. *Brown & Brown Coal Co.* v. *Grand Trunk R. System*, 565.

2. That while plaintiff was proceeding from her seat in defendant's car to the door, the conductor signaled for the car to start and the jerk threw and injured plaintiff, presents a question of fact for the jury in an action for negligent injuries. *Reese* v. *Detroit United Ry.*, 600.

See DAMAGES (1); EVIDENCE (3); MANDAMUS (7).

CEMETERIES—See EASEMENTS (6); EMINENT DOMAIN (4, 5).

CERTIORARI.

Certiorari does not lie, as in actions at law, to review the order of a circuit court in disbarment proceedings overruling a demurrer to the charges filed against an attorney, until after a final determination. Act No. 310, Pub. Acts 1905. *In re Radford*, 91.

See JUSTICES OF THE PEACE (1).

CHANCERY APPEALS—See APPEAL AND ERROR (1, 15); MANDAMUS (7).

CHANCERY PRACTICE—See APPEAL AND ERROR (9).

CHANGE OF VENUE—See VENUE.

CHURCHES—See EASEMENTS (6).

CIVIL ACTION—See MALICIOUS PROSECUTION (1).

CIVIL-DAMAGE ACT—See CONSTITUTIONAL LAW (18); EVIDENCE (22); INTOXICATING LIQUORS (4).

CLEAN HANDS—See CANCELLATION OF INSTRUMENTS (2).

CLOUD ON TITLE—See REFORMATION OF INSTRUMENTS (3, 5).

COLLATERAL ATTACK—See ESTATES OF DECEDENTS (2).

COLLATERAL ISSUES—See EVIDENCE (25); TRESPASS TO PERSON (4).

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COLLUSION—See DIVORCE (4).

COMMISSION—See BROKERS.

COMMISSIONER OF INSURANCE—See INSURANCE (11).

COMPENSATION—See BROKERS; EMINENT DOMAIN (3).

COMPETENCY—See CONTRACTS (7).

COMPROMISE AND SETTLEMENT.

In the absence of fraud or overreaching, the compromise of a claim against the estate of a decedent, made to avoid the expense of litigation by one in possession of the entire property under a conveyance made by the deceased to take effect at his death, is supported by adequate consideration, and is not subject to rescission in equity. *Bull* v. *Hepworth*, 662.

See FRAUDS, STATUTE OF (1).

CONCEALMENT—See LANDLORD AND TENANT (6).

CONCLUSIONS—See EVIDENCE (4).

CONDEMNATION PROCEEDINGS—See EASEMENTS (10).

CONDITIONAL SALES — See DAMAGES (2); RAILROADS; SALES (2, 3, 6, 16).

CONDITIONS PRECEDENT—See CONTRACTS (4); INSURANCE (9).

CONDUCT OF COUNSEL—See TRIAL (9).

CONDUCT OF COURT—See CRIMINAL LAW (1); TRIAL (7).

CONFESSIONS AND ADMISSIONS—See EVIDENCE (20.)

CONFIDENTIAL COMMUNICATIONS—See EVIDENCE (11).

CONSIDERATION—See COMPROMISE AND SETTLEMENT; EVIDENCE (2, 12, 13); SALES (5); SPECIFIC PERFORMANCE.

CONSIGNMENT—See SALES (16, 18).

CONSOLIDATION OF STREET RAILWAYS—See STREET RAILWAYS (1–3).

CONSPIRACY—See INSURANCE (3); TRIAL (5).

CONSTITUTIONAL LAW.

1. Treaties between the United States and Canada, fixing the boundary lines between the countries, are the supreme law of the land, binding upon State courts. *Ainsworth* v. *Munoskong Hunting & Fishing Club*, 61.

2. Acts of congress affecting the terms of treaties are not subject to the jurisdiction of the courts but relate to the political department of government. *Id.*

3. An act of congress (29 U. S. Stat. 54), for the regulation of anchorage in St. Mary's river, will not be held to effect a change by implication in the relation of Munoskong Bay to

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CONSTITUTIONAL LAW—Continued.

Lake Huron by making it a part of St. Mary's river, notwithstanding the terms of the statute affect the bay and include it within the regulations. *Id.*

4. An order of the probate court for the private sale of property by an administrator or executor may be made in accordance with the first three sections of Act No. 209, Pub. Acts 1909, which is not unconstitutional because the fourth section is invalid for failure of the title to embrace its object. Const. 1850, Art. iv, § 20. *Klatt* v. *Wayne Probate Judge*, 208.

5. An unconstitutional provision or section in a statute will not affect the other provisions of the law unless they are essentially and reasonably connected in substance. *Id.*

6. Act No. 67, Pub. Acts 1909, which contains a proviso that a change of venue may be procured on motion in causes pending in the manner provided by 1 Comp. Laws. § 309, as amended by Act No. 309, Pub. Acts 1905, does not re-enact the repealed provisions of such Act No. 309, in view of the constitutional prohibition against a revision or amendment by mere reference to an act. *Grand Rapids, etc., R. Co.* v. *Cheboygan Circuit Judge*, 210.

7. A statute by which a committee on appeal is appointed by members of the board of supervisors who consider themselves aggrieved by an apportionment of taxes between townships and cities, giving the committee power to summon witnesses, consider evidence and determine whether the equalization is just, confers *quasi* judicial powers. Act No. 292, Pub. Acts 1909. *Zimmer* v. *Board of Sup'rs of Bay County*, 213.

8. Such committee is not a court within the meaning of Constitution, Art. 7, § 1, requiring a two-thirds vote of the legislature to establish additional courts. *Id.*

9. It is in violation of the constitutional principle of local self-government for the legislature to enact a statute which authorizes a dissatisfied member of the board of supervisors to create a committee of three consisting of nonresidents of the county, of whom the dissenting member is authorized to name one, and who are required by the act to determine whether or not the apportionment among townships and cities is just. *Id.*

10. The legislature has no power under the Constitution to clothe one or two supervisors of a county with authority to name a tribunal which shall have the right to assume and perform the duties devolving upon the board itself under the law. *Id.*

11. A statute which permits a supervisor, aggrieved by the apportionment of a tax, to name one of the members of a board or committee to act as an appeal tribunal, violates the rule that no man may be a judge or select the judge of a case in which he has an interest. *Id.* 214.

12. The facts in this case involve the construction of Act No. 292, Pub. Acts 1909, and it is ruled by the preceding case of *Zim-*

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CONSTITUTIONAL LAW—Continued.

mer v. *Board of Sup'rs of Bay Co.*, *ante*, 218. *Robinson* v. *Westover*, 225.

13. The act for the regulation of the manufacture and sale of intoxicating liquors is not in violation of the Constitution of 1850, art. 4, § 20, providing that no law shall embrace more than one object which shall be expressed in its title, in that it provides a civil remedy for the violation of the statute. 2 Comp. Laws, §§ 5379–5446. *Sisson* v. *Lampert*, 509.

See MANDAMUS (7).

CONSTRUCTION BONDS—See MUNICIPAL CORPORATIONS (5); PRINCIPAL AND SURETY (5, 7).

CONSTRUCTION OF CONTRACT—See CONTRACTS (3).

CONSTRUCTION OF LEASE—See LANDLORD AND TENANT (7).

CONSTRUCTION OF STATUTES—See CONSTITUTIONAL LAW (4, 5); EMBEZZLEMENT (4); ESTATES OF DECEDENTS (4); RAILROADS; STATUTES.

CONSTRUCTIVE KNOWLEDGE—See MASTER AND SERVANT (8).

CONTRACTS.

1. A parol antenuptial agreement, valid because executed on the one side and because of execution tendered on the other, providing for a transfer of insurance to the wife in consideration of a devise of realty may not be annulled by one of the parties who was, at the time of the attempted annulment, the husband and guardian of the other, the alleged reason for the rescission being that the wife was incompetent to execute her part of the agreement. *Andrews* v. *Lavery*, 27.

2. A person who agrees with the contractor to manufacture and furnish cement blocks for a public sewer, making the blocks with machines furnished by the contractor, without undertaking to perform any part of the original contract with the city, is not a sub-contractor but a materialman, entitled to recover on the bond of the contractor for the security of laborers and materialmen. 3 Comp. Laws, § 10743. *People, for use of Kuenzel*, v. *National Construction Co.*, 133.

3. In a permit to cut timber, clauses conveying the right to cut and remove the timber for fifteen years, for the use of the grantee, from the lands of the grantor, and to have and "to hold the same for the period aforesaid to the use and benefit" of the grantee, the contract designating the parties as licensor and licensee, constituted a license to cut and remove the timber, title to which would pass after it should be cut and removed. *Scott* v. *Sullivan*, 297.

4. Under a condition in such contract that a failure to pay certain taxes should operate as a surrender, cancellation or abandonment of all rights under the contract, and time should be of the essence of the agreement, a failure for three successive years to pay the taxes within the time limited terminates all rights under it as for a breach of a condition precedent. *Id.*

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CONTRACTS—Continued.

5. A party who insists that no forfeiture has taken place may not claim relief by amended pleadings, upon the inconsistent theory that equity will relieve from a forfeiture upon the tender of performance within the terms of the contract. *Id.*

6. No meritorious case warranting equitable relief from the forfeiture of rights under the agreement is made by testimony showing that the party in default forgot the time allowed to him under his license, and delayed performance after notice of his default, because it would be inconvenient to make the required payments. *Id.*

7. A man of 58 years of age who, although affected by Bright's disease, is able to comprehend the purpose of a transfer of insurance from his wife to his daughter, and whose intention appears rational, is properly held to have been competent to execute the transfer. *Andrews* v. *Lavery*, 26.

See ATTACHMENT (2); CANCELLATION OF INSTRUMENTS; CORPORATIONS (2–4); DAMAGES (2); EVIDENCE (7); FRAUD (3); FRAUDS, STATUTE OF; INSURANCE (8); LAND CONTRACTS; LANDLORD AND TENANT (7); MUNICIPAL CORPORATIONS (1, 2); PRINCIPAL AND SURETY (2); SALES (1–5, 7, 11); SPECIFIC PERFORMANCE; USURY; WITNESSES.

CONTRIBUTION—See PARTNERSHIP (2).

CONTRIBUTORY NEGLIGENCE — See DEATH BY WRONGFUL ACT (2); MASTER AND SERVANT (13); NEGLIGENCE (12); STREET RAILWAYS (4, 5).

CONVEYANCES—See DEEDS (2, 3); WILLS (7).

CORPORATIONS.

1. In so far as it is necessary for a bill of complaint to aver an attempt to procure a settlement from the company, it is sufficient in showing that the corporation was substantially owned by one man, that he had authority to act for the company and refused to pay the indebtedness to the complainant, and that the latter was denied an examination of defendant's books which had been removed from the State. *Kimmerle* v. *Dowagiac Gas Co.*, 34.

2. A surety is liable on its bond for the construction of a public work where the contractor, a foreign corporation, which has omitted to comply with the requirements of statute for the carrying on of business within the State, fails to pay for material furnished. *Kuennan* v. *United States Fidelity & Guaranty Co.*, 123.

3. A foreign corporation engaged in business in Michigan is estopped to dispute the validity of its contracts for non-compliance with the statute regulating the transaction of local business. Act No. 34, Pub. Acts 1903. *Id.*

4. Such contracts are not void, but merely unenforceable by the foreign corporation until it complies with the statute. *Id.*

5. Under statutes of Michigan separating the functions of tele-

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CORPORATIONS—Continued.

graph and telephone companies and restricting the right of one company to engage in the two kinds of business, mandamus will not issue in favor of a foreign corporation to compel the secretary of State to issue a certificate of authority to transact both kinds of business in Michigan, although the corporation is authorized so to do in the State where it is organized. *American Telephone & Telegraph Co.* v. *Secretary of State*, 195.

6. Where complainants, who were minority stockholders in an insolvent railroad company whose assets were sold by defendants to a corporation in which they were principal stockholders, without observing the due formalities of law, and without the consent of complainants, bring an action for an accounting, and for damages based on the wrongful sale, and, on the trial, it was shown that at the time of the transfer the liabilities of the railroad company, which were assumed by the purchaser as the consideration, largely exceeded the assets, and the sale was made in good faith, and the result would have been the same if the legal formalities had been observed, a judgment for nominal damages only will be affirmed. *Thoman* v. *Mills*, 402.

See ACCOUNTING; ACTION; FRAUD (2); INSOLVENCY; LIMITATION OF ACTIONS; STREET RAILWAYS (1–3).

COSTS.

Costs are taxable in the Supreme Court against the persons beneficially interested as assignees of a cause of action by virtue of an assignment made prior to the commencement of the action, within the terms of 3 Comp. Laws, § 11281. *Baumgarth* v. *Firemen's Fund Ins. Co.*, 207.

COUNTIES—See CONSTITUTIONAL LAW (9).

COURTS—See ACTION (3); ATTORNEY AND CLIENT (1, 2); CONSTITUTIONAL LAW (1, 2, 7, 8, 11); MANDAMUS (6).

COVENANTS—See DEEDS (2, 3, 6–13).

CREDITORS' SUIT.

1. Neither a creditor's bill nor a bill in aid of execution is sustainable upon a judgment in attachment against a nonresident, wherein the jurisdiction of the court depended on the debtor's ownership of the land attached and where the bill of complaint avers that legal title thereto was taken in the name of a third person, for the convenience of the debtor. *Bliss* v. *Tyler*, 502.

2. A bill of complaint in which it is claimed that certain property of a nonresident debtor has been impounded by the creditor in attachment proceedings, cannot be sustained as a bill for impounding equitable assets based on the ground of continued absence from the State. *Id.*

CRIMINAL LAW.

1. The following charge in a prosecution for manslaughter is

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CRIMINAL LAW—Continued.

open to the objection that it tends to inflame the minds of the jury: "This awful deed was committed in the broad light of day in the open streets of Ypsilanti, in bold and wicked defiance of all human and divine law. * * * So far as we know, on this April morning life was as sweet and precious to this poor wife and mother as it was to the prisoner. A more horrible or brutal death can scarcely be conceived. It shocked the senses of the entire community. There remains but little that you or I can do. We cannot restore life to this stricken woman; but we may do our share towards the guarding and protecting of human life hereafter." *People* v. *Poole*, 350.

2. It is error to charge the jury that the defendant, who killed his wife after being informed of her unlawful relations with another man, might be found guilty of no higher crime than manslaughter, if he was in a state of such excitement that his reason was dethroned and he was driven along by an uncontrollable and irresistible impulse so that he was no longer morally or legally responsible for his crime or what he was doing or where he was, and had gone some distance from this scene before he was able to recover himself and his senses. *Id.*

3. A respondent is guilty of manslaughter for killing a person, as distinguished from murder, if reason was at the time disturbed by passion to an extent which might render ordinary men of fair average disposition liable to act rashly or without due deliberation, and from passion rather than judgment. *Id.*

4. A respondent on trial for murder may be cross-examined after he has testified in his own behalf, as to any discrepancies between his testimony and a prior statement made by the respondent at the time of arraignment. *Id.*

5. The jury should be instructed, if so requested by respondent, that to warrant a verdict of guilty the jurors must unanimously find that the accused committed the act as testified to. *People* v. *Nichols*, 356.

6. The statement in the argument of the prosecuting attorney upon his official oath that a certain witness testified truthfully, is a fatal error. *People* v. *Treat*, 77 Mich. 348 (43 N. W. 963). *Id.*

7. Facts of which the prosecuting attorney has personal knowledge should be presented to the jury by him as a witness, and not in his argument. *People* v. *Williams*, 518.

8. A respondent convicted of lewd and lascivious cohabitation within 3 Comp. Laws, § 11693, providing for imprisonment in the county jail for not more than one year, or a fine not exceeding $500, is not subject to 3 Comp. Laws, § 11785, imposing an additional term of imprisonment in the State prison for subsequent offenses in the case of persons duly sentenced to one year or more therein. *In re Bolden*, 629.

9. A prisoner sentenced to two and one-half years in the State

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CRIMINAL LAW—Continued.

prison under such statutes is entitled to release on habeas corpus. *Id.*

10. No formal adjournment is necessary on preliminary examination of a person charged with a crime, where the testimony was taken by a stenographer before the examining magistrate, and the decision of the justice to bind over the respondent announced orally, and after twelve days the witnesses were brought in, signed their testimony as extended, and the defendant was remanded into custody. *Oblaser* v. *Wayne Circuit Judge*, 665.

11. The court will take judicial notice of the fact that some time is required to reduce stenographic notes of testimony taken on preliminary examination to typewritten form. *Id.*

12. It does not preclude further action in the case for the justice to announce his decision to bind over the respondent under the testimony, at the close thereof, before it has been signed by the witnesses. *Id.*

13. The intention to make a valid order and to sign the testimony at the proper time will be presumed. *Id.*

14. The return of the examining magistrate, which is defective in not being properly verified, or in failing to contain the signed testimony and a proper affidavit, may be amended or a new return filed. *Id.*

See APPEAL AND ERROR (10); EMBEZZLEMENT (5–7); EVIDENCE (19, 20); INDICTMENT AND INFORMATION; INTOXICATING LIQUORS (1–3, 5–7); RAPE.

CROP, INTERESTS IN—See ESTOPPEL (1).

CROP RENTS—See ESTOPPEL (1); LANDLORD AND TENANT (1).

CROPS—See PARTITION.

CROSS-EXAMINATION—See CRIMINAL LAW (4); EVIDENCE (18, 25); TRIAL (5, 9, 10).

CUSTOMS AND USAGES—See NEGLIGENCE (8); SALES (18).

DAMAGES.

1. In an action for damages based upon a wrongful expulsion from a train of the defendant, in which the declaration did not put in issue the question of damages for the value of plaintiff's ticket, testimony as to the amount paid for the ticket is properly excluded. *Pierson* v. *Illinois Cent. R. Co.*, 110.

2. In replevin by the seller of a cash register under a contract reserving title, the defendant who waives a return of the property is entitled, not to the value of the property, but to only such damages as are shown to have resulted from the seizure, and in the absence of evidence of actual damages, a judgment for nominal damages should be rendered. *National Cash Register Co.* v. *Richards*, 129.

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DAMAGES—Continued.

3. The damages sustained by a third person from the wrongful levy of an execution are the value of the property converted plus the amount of depreciation of the goods. *McCausey* v. *Hoek*, 570.

4. A trespasser who interrupts a merchant's business is liable for the injury to the business. *Id.*

5. The cost of repurchase of the goods is not the full measure of damages where a merchant is deprived of his entire stock; and he may recover for profits lost as measured by previous gains, and for losses sustained in performing contracts from which he would otherwise have profited. *Id.*

6. The damages so recoverable in an action of tort are subject to the duty to mitigate them by the purchase of other goods. *Id.*

See CORPORATIONS (6); DEEDS (8); EMINENT DOMAIN (1, 3); LAND CONTRACTS (1); SALES (7).

DEATH BY WRONGFUL ACT.

1. A continuing injury, resulting in death within a few moments, is instantaneous within the meaning of the death act; 3 Comp. Laws, § 10427, and where an injured person continued to live for fifteen minutes after he was struck by a street car, being dead when removed from beneath it, the action should be brought under the death act and not the survival act. *West* v. *Detroit United Railway*, 269.

2. While a pedestrian may rely, in crossing a street car track near its intersection with another track, on a custom or regulation to stop cars at a given place, the rule is not applicable to a decedent who, while engaged in conversation, attempted to cross in front of a car in plain view running at full speed, when a glance at it must have advised the deceased that it was not intended to observe the custom. *Id.*

See EVIDENCE (22); INTOXICATING LIQUORS (4).

DEATH OF PARTY—See APPEAL AND ERROR (4); ATTORNEY AND CLIENT (4).

DEBTOR AND CREDITOR—See ACCOUNTING (1); CREDITORS' SUIT (1); EXEMPTIONS (1); FRAUDULENT CONVEYANCES; SALES (12); STREET RAILWAYS (2).

DECEIT—See ESTOPPEL (1).

DECLARATIONS OF TESTATOR—See WILLS (2, 6).

DECREES IN EQUITY—See MANDAMUS (6).

DEED AS MORTGAGE—See EVIDENCE (14).

DEEDS.

1. It is a question for the jury to determine whether or not an alteration was made in a deed which contained the interlineation of the letter "S" in the grantee's name and the abbreviation, "Jr.," after it, referring to defendant's son, and

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DEEDS—Continued.

which the defendant claimed he told the notary to execute to himself as grantee; his testimony being contradicted. *Fors* v. *Fors*, 156.

2. An incumbrance, within the meaning of covenants in deeds, is defined as every right to or interest in the land, to the diminution of the value of the land, but consistent with the passing of the fee by conveyance. *Simons* v. *Diamond Match Co.*, 241.

3. A term for years under a lease prior to the conveyance is an incumbrance, which is not excepted from the warranty by reason of the fact that the grantee knew of the outstanding lease. *Id.*

4. Evidence is inadmissible to show that an existing incumbrance was regarded in fact as no incumbrance. *Id.*

5. The right to collect reserved rent passes with the title. *Id.*

6. A covenant against incumbrances is personal, broken when made, and does not run with the land. *Id.*

7. Oral assurance that tenants in possession have no rights in the premises cannot add to or vary the warranties of a deed. *Id.*

8. The assignee of rights for breach of the covenant against incumbrances takes only such right as the assignor had and is limited to nominal damages if the assignor was so limited. *Id.*

9. The covenant, if a breach occurs, is broken when made. *Id.*

10. An eviction of the grantee occurs when a deed is executed conveying land held under an outstanding lease, not excepted from its warranties. *Id.*

11. One who has parted with his interest in land parts with his right to enforce the covenants in prior deeds, until he is made liable upon his own covenants and has satisfied his liability. *Id.*

12. The covenant for quiet enjoyment is prospective, and until a breach occurs passes with the estate by descent or purchase. *Id.* 242.

13. An outstanding lease is in no instance a breach of the covenant of warranty and should in all cases be held to be a breach of the covenant against incumbrances. *Id.*

See EQUITY JURISDICTION (2); EVIDENCE (2, 12–14); REFORMATION OF INSTRUMENTS (3, 4); SPECIFIC PERFORMANCE; WILLS (7).

DEFAULT—See LANDLORD AND TENANT (9).

DEFENSES—See ESTOPPEL (2); INSURANCE (3, 8, 14); JUDGMENT (2); LANDLORD AND TENANT (6); MANDAMUS (3); PRINCIPAL AND SURETY (4); REFORMATION OF INSTRUMENTS (4).

DELIVERY—See INSURANCE (8); PLEADING; WILLS (8).

DEMURRER—See CERTIORARI.

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DIRECTED VERDICT—See TRIAL (4).

DISBARMENT PROCEEDINGS—See ATTORNEY AND CLIENT (1); CERTIORARI.

DISCHARGE—See CRIMINAL LAW (9).

DISCRIMINATION—See CARRIERS (1).

DISTRIBUTION OF PERSONAL ESTATE—See EXECUTORS AND ADMINISTRATORS (1).

DIVISION OF PROPERTY—See MANDAMUS (8).

DIVORCE.

1. An application for divorce on the ground of extreme cruelty, supported by sufficient testimony, may not be refused because the complainant had been twice previously divorced, and on the second occasion for her own fault. *Orton* v. *Orton*, 236.

2. An allowance may be made by the Supreme Court for solicitors' fees and expenses in an appeal from a decree refusing complainant a divorce, after the filing of a claim of appeal, although the testimony has not been settled or the return made. Act No. 299, Pub. Acts 1909. *Breen* v. *Breen*, 389.

3. A complete refusal of a defendant to cohabit with her husband during a period of nearly three years constitutes extreme cruelty. *Case* v. *Case*, 491.

4. No evidence of collusion warranting the court in denying a decree for divorce is presented by a showing that the husband consulted a lawyer concerning his right to a divorce and his wife thereafter refused for about three years to perform her marital duties, or by the fact that the parties adjusted their property matters by an agreement of the husband to pay her alimony in a lump sum. *Id.*

5. Calling his wife vile names, accusing her of theft and of infidelity constitute extreme cruelty on the part of the husband. *Delor* v. *Delor*, 624.

6. Testimony received and considered in a suit for divorce taken upon a reference to a commissioner by the court of its own motion, works no prejudice to an appellant where the point which it tends to sustain is decided by the court in appellant's favor. *Id.*

7. The interest of a wife in an estate by the entireties cannot be diminished by a decree for divorce. *Id.*

8. An allowance to the wife of $3,800 in lieu of her interest in certain real property held by the entireties and valued at $7,000 is not excessive. *Id.*

See MANDAMUS (8).

DOMICILE—See WILLS (1).

DRAINS—See EASEMENTS (7); JUDGMENTS (1).

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DRUGGISTS—See INTOXICATING LIQUORS (2, 3).

DUPLICITY—See APPEAL AND ERROR (2); EQUITY PLEADING (1).

EASEMENTS.

1. An infrequent user for occasional convenience of adjoining premises by one having ample means of access to his own premises is a permissive user. *Menter* v. *First Baptist Church of Eaton Rapids*, 21.

2. An easement by prescription depends on a user under such circumstances that the owner of the servient estate acquired actual notice of the adverse claim. *Id.*

3. The character of such use or occupancy under an adverse and hostile claim of right may be evidence of actual notice, but it must be so open, notorious and hostile as to leave no doubt in the mind of the owner that his rights are invaded. *Id.*

4. A permissive user can never ripen into title by prescription. *Id.*

5. Passing over uncultivated land which is not inclosed by fences is not inconsistent with the use which the owners make of the land. *Id.*

6. An adjoining proprietor cannot obtain title to a right of way over the grounds of a church, schoolhouse or other *quasi* public institution by occasionally passing through the gates over the inclosed lands to his own premises. *Id.*

7. A bill in equity will not lie to enjoin the township highway commissioner from enlarging a drain under the highway which, for more than fifteen years previous, had obstructed a portion of the natural flow of water upon complainant's premises from the upper proprietors' land, and no prescriptive right could be gained as against the public to restrict the amount of water which would otherwise naturally descend upon the servient estate. *Smith* v. *Barrett*, 325.

8. The owner of a forty acre tract which is cut off from the highway by another forty acre parcel which was at one time held by a common grantor, has a way of necessity across the intervening parcel to such highway. *Moore* v. *White*, 460.

9. That the owner of the servient estate offered to sell a right of way across other lands owned by him in no way affects the easement. *Id.*

10. Such owner of the easement is not required to resort to the condemnation of a private road under 2 Comp. Laws, § 4142, *et seq.* *Id.*

11. Where the owner of the servient tenement refused to locate a right of way and the holder of the dominant estate chose a way which was reasonable, the court of equity will protect his rights. *Id.*

12. One who claims a right of way by necessity over adjoining lands may make the way passable and is required to maintain necessary fences at either end and keep the road in repair. *Id.*

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EJECTMENT.

One entitled to the possession of land may maintain ejectment. *Moody* v. *Macomber*, 657.

See EXECUTORS AND ADMINISTRATORS (2).

ELECTION OF OFFENSE RELIED ON—See RAPE.

ELECTION OF RIGHTS—See CONTRACTS (5).

ELECTIONS—See MANDAMUS (4).

ELECTRIC RAILROADS—See FRAUD (2); MECHANICS' LIENS (4).

EMBEZZLEMENT.

1. An indictment against a State treasurer for embezzlement is sufficient which charges a statutory offense in the language of the statute without stating the evidence, although it alleges generally that the funds were unlawfully converted to the use of a bank of which he was the principal stockholder, where the idea of a lawful appropriation or deposit is negatived in the indictment. *People* v. *Glazier*, 528.

2. Under 1 Comp. Laws, § 1189 *et seq.*, the State treasurer is liable as a bailee for State funds in depositories selected according to law. *Id.*

3. It is unlawful for the State treasurer to deposit funds in a bank for any pecuniary inducement. 1 Comp. Laws, § 1201. *Id.*

4. The intent of a general statute to modify a special act being plain, the rule that a subsequent general statute will not be held to modify a special statute is inapplicable. *Id.*

5. The fact that the inducement to the State treasurer to deposit money in a bank of which he was a principal stockholder consisted in the gain which he would indirectly receive, does not affect his criminal liability under 1 Comp. Laws, § 1201. *Board of Fire & Water Com'rs of Marquette* v. *Wilkinson*, 119 Mich. 655 (78 N. W. 893, 44 L. R. A. 493). *Id.* 529.

6. The joinder in an indictment of several counts for the unlawful appropriation of different sums of money by the State treasurer is not objectionable, and may be treated as a specific statement of the successive acts constituting a single offense under 3 Comp. Laws, § 11614. *Id.*

7. A public officer who devotes funds in his custody to any other purposes than those which the law authorizes must account for them to his successor or be guilty of a felony under 1 Comp. Laws, § 1201, no matter how good his intentions may have been. *Id.*

8. The checks and drafts by means of which money was deposited by the treasurer were admissible in evidence to show the unlawful appropriation of money charged in the indictment. *Id.*

9. No prejudicial error results from the admission, in a prosecution for embezzlement, of testimony to show the respondent's bad faith which was not a necessary element of the offense. *Id.*

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EMINENT DOMAIN.

1. Evidence of the damaging effect of a proposed public improvement on any portion of the public is competent to affect the question of public necessity. *Board of Education of City of Grand Rapids* v. *Brown*, 148.

2. The admission of testimony tending to show damage from a public improvement to a portion of the public whose property is not to be taken for the improvement, is not error where the fact appeared from other competent testimony and from the view of the premises. *Id.*

3. On motion for rehearing, an error contained in the opinion in this case, reported in 156 Mich. 511, is corrected, and the questions involved are held to be governed by *City of Detroit* v. *Railway*, 156 Mich. 106. *City of Detroit* v. *Snyder*, 227.

4. In proceedings to take private property for public use as a cemetery, an answer which admits that the cemetery in use is crowded and that public health and convenience require the selection of a new cemetery, constitutes a sufficient admission of the necessity of the public improvement and limits the issue to the question of the necessity for taking the defendant's property. *McDonald* v. *Marquette Circuit Judge*, 367.

5. Mandamus will not lie to compel a circuit judge to vacate an order striking out portions of an answer to a petition in such proceedings, where the answer attempted to place in issue immaterial questions relating to the interest of private parties who agreed to bear the expense of removing the bodies from the old cemetery to the proposed new one, in consideration of mining privileges in the former, and where other portions struck out related to the question of damages. *Id.*

See INJUNCTION (11).

ENFORCEMENT BY EXECUTION—See MANDAMUS (6).

ENFORCEMENT OF JUDGMENT AT LAW—See INJUNCTION (3).

EQUITY.

1. A bill of complaint is sufficient as against an objection that the remedy at law is adequate if it sets forth facts which render relief in an action at law difficult and inadequate because of the intricacy of contracts involved in the proceeding and the character of acts done in carrying out their provisions. *Kimmerle* v. *Dowagiac Gas Co.*, 85.

2. It is proper to join as parties defendant in an action for accounting under such contracts, the original debtor, the new corporation which assumed the obligation and a bank which acted as trustee of the assets which were to be transferred to the new corporation, in carrying out the promotion scheme. *Id.*

3. Laches may bar a complainant from setting aside the allowance of a claim in probate when he permits several years to intervene before filing the bill, which fails to negative knowledge of the death of deceased and her ownership of property. *Andrews* v. *Osborn*, 77.

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EQUITY—Continued.

4. The defense of the statute of limitations should be raised before the commissioners to whom a claim is presented, or on appeal, and is barred as a ground for setting aside the judgment by the allowance of the claim. *Id.* 78.

5. He who seeks equity must do equity. *Metropolitan Life Ins. Co.* v. *Freedman*, 114.

6. Complainants are not barred by laches from questioning conveyances of the property to their brothers, where they moved promptly after their father's death and after notice, by the assertion of an adverse claim that the repurchase was not intended for their benefit, being entitled until such notice to assume that the repurchase was originally for their benefit and that the subsequent conveyances affected only the life estate. *McCall* v. *McCall*, 144.

7. In a suit to set aside an invalid conveyance to the defendant, who claimed to have paid a certain amount due on an outstanding mortgage and taxes for the construction of a drain, and who claimed an allowance for care and support furnished to his father, a decree disallowing the other claims and requiring reimbursement to the defendant for the amount paid on the mortgage is affirmed on the ground that it is supported by evidence of the defendant's having had the use of the farm and having moved valuable buildings from it to his own land. *Id.*

See APPEAL AND ERROR (2); CANCELLATION OF INSTRUMENTS (2); CONTRACTS (5, 6); EASEMENTS (11); FRAUD (3); INJUNCTION (2); INSURANCE (1); JUDGMENT (1); MANDAMUS (7); PARTNERSHIP (2–4); REFORMATION OF INSTRUMENTS (1, 3); SPECIFIC PERFORMANCE; TRUSTS.

EQUITY JURISDICTION.

1. Equity having acquired jurisdiction on one ground will retain it for the purpose of giving such relief as will dispose of the controversy. *Nisbett* v. *Milner*, 337.

2. The jurisdiction of equity, exclusive of any statutory provisions on the subject, to set aside deeds and other legal instruments which are a cloud upon the title to real estate and to order them to be delivered up, is fully established. *Id.* 338.

See CANCELLATION OF INSTRUMENTS (1); REFORMATION OF INSTRUMENTS (5).

EQUITY PLEADING.

1. The court in chancery may permit a double plea. *Andrews* v. *Osborn*, 77.

2. A bill to restrain the enforcement of a judgment at law must be positive, explicit and certain. *Id.*

3. If fraud is the ground upon which the aid of equity is asked to enjoin the enforcement of a judgment, it is not sufficient to incorporate in the bill general allegations of fraud, deceit or misconduct, but the specific facts constituting the alleged fraud must be set forth. *Id.*

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EQUITY PRACTICE—See APPEAL AND ERROR (15); INJUNCTION (8).

ESTATES BY THE ENTIRETIES—See DIVORCE (7).

ESTATES OF DECEDENTS.

1. The allowance of a claim against an estate of a deceased is conclusive on all persons interested whether residents of the State or not, if the steps required by statute are regularly taken to notify the parties in interest, unless successfully impeached for fraud. *Andrews* v. *Osborn*, 77.

2. A bill which avers that a claimant fraudulently presented a claim against an estate, and that it was false and fraudulent and he procured its allowance by false testimony, is too general to warrant relief for fraud. *Id.*

3. The presumption of law that services rendered by a member of decedent's family were rendered gratuitously for the common benefit, does not bar a claim by a son-in-law for board furnished his wife's deceased father, who lived in a separate home on the premises, if the jury find that the parties understood that compensation should be made. *Weessies* v. *Van Dyke's Estate*, 180.

4. There being no limit to the value of real estate which could be sold at private sale, under Act No. 261, Pub. Acts 1905, amending chapters 243 and 244, 3 Comp. Laws, wherein a limitation of $500 was made; and a subsequent statute, Act No. 209, Pub. Acts 1909, being construed to refer to the statute as amended, it is proper to order a private sale by an administrator of real property worth more than $500. *Klatt* v. *Wayne Probate Judge*, 203.

See COMPROMISE AND SETTLEMENT; EQUITY (4); EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

1. One who rents lands for a share of the crops determined specifically, by rows, in advance, is estopped to set up his agreement, in an action of trover for converting a portion of his share, against a defendant who took the interest of the lessor and appropriated a third of the crop in reliance on the tenant's statement that the owner was to have an undivided third of the corn. *Schultz* v. *Dennison*, 259.

2. The statement in letters to the seller of the grounds on which the purchaser of goods relied in rejecting them is conclusive upon him, and constitutes a limitation of his defense to an action for the price. *Providence Jewelry Co.* v. *Bailey*, 285.

See CORPORATIONS (3); LANDLORD AND TENANT (5); MECHANICS' LIENS; PRINCIPAL AND AGENT (3, 4); SALES (16); STREET RAILWAYS (2).

EVICTION—See DEEDS (10).

EVIDENCE.

1. An action of tort arising in a foreign jurisdiction is not barred on the ground that no recovery could be had in such jurisdic-

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EVIDENCE—Continued.

tion without evidence of the foreign law. *Carnell* v. *Halpin*, 42.

2. Testimony tending to show that property was deeded to a municipal corporation for a boulevard, under an agreement with the members of the municipal boulevard commission that special assessments were not to be made for improvements, is competent to show the true consideration. *Scovel* v. *City of Detroit*, 95.

3. Testimony concerning a conversation held between the plaintiff and defendant's conductor three hours after the plaintiff was ejected from defendant's train is inadmissible under a declaration which counts only on the ejection. *Pierson* v. *Illinois Cent. R. Co.*, 110.

4. A statement by a witness that plaintiff groaned involuntarily is an inadmissible conclusion. *Id.*

5. A divorced wife may not testify to diseases of her former husband of which she learned by communications during the marriage relation; the evidence being excluded as privileged under 3 Comp. Laws, § 10213. *Id.*

6. An objection that the testimony should be struck out, because the parties were husband and wife at the time covered by the testimony, sufficiently apprised the trial judge of the reason relied on. *Id.*

7. The plaintiff's books of account showing the number of loads of material furnished under a contract to deliver sand and gravel for the construction of a public sewer, are admissible in evidence to show the number of loads delivered when they are supported by further testimony showing their correctness, in an action against the surety on the statutory bond to protect materialmen. *Kuennan* v. *United States Fidelity & Guaranty Co.*, 122.

8. Testimony is competent to show that the plaintiff, after his colts were injured by defendant's dog, was refused permission to see the animal by defendant's servant in the presence of the defendant. *Meilke* v. *Schabble*, 168.

9. It was not prejudicial to admit evidence that the wife of defendant also refused to permit the plaintiff to see the dog. *Id.*

10. That there was no other dog of similar appearance in the vicinity is proper evidence to identify the defendant's animal. *Id.*

11. Letters of a wife to her husband containing confidential communications are admissible as evidence tending to show that she destroyed insured property by fire, where they came into the possession of third persons, without collusion, by finding. 3 Comp. Laws, § 10213. *O'Toole* v. *Ohio German Fire Ins. Co.*, 187.

12. Parol evidence is, under the established rule in this State, competent to show the actual consideration for deeds of land where the rights of innocent purchasers for a valuable consideration are not involved. *Ruch* v. *Ruch*, 231.

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EVIDENCE—Continued.

13. The expression of one consideration does not exclude proof of another and the actual consideration. *Id.*

14. A deed may be shown to have been in fact a mortgage. *Id.*

15. In an action of trespass for an assault with intent to ravish, any error which may have been committed on the trial, in admitting evidence of the defendant's good character, is cured by subsequently striking out the testimony and charging the jury that it was withdrawn from their consideration. *Walsh* v. *Gibson*, 312.

16. Repeated questions, on cross-examination of the plaintiff, having a tendency to prove her evil reputation by specific instances of misconduct, were not reversible error, where the trial court excluded the evidence, and counsel for the plaintiff stated that he did not object to such evidence and had previously admitted similar testimony without objection. *Id.*

17. Testimony as to the identity of the maker's signature on a promissory note, based upon witness' knowledge of the writing of the maker obtained as supervisor from statements of assessable property made under 1 Comp. Laws, §§ 3841–3846, is not rendered incompetent by the provisions of the statute, which prohibit the use of such tax statement for any purpose except the assessment of taxes or the enforcement of the provisions of the act. *Jewett* v. *Bryant*, 345.

18. Prejudicial error is not committed by a trial court, which excludes the testimony of a witness, asked on cross-examination whether he did not tell his attorney in another proceeding that the same maker's signature on another note held by an estate, of which the witness had been executor, was not genuine. *Id.* 346.

19. Previous or subsequent acts of intercourse are admissible to corroborate the evidence of the offense charged, but not to sustain a conviction for a separate offense. *People* v. *Nichols*, 355.

20. The written admissions of a girl of thirteen years of age, as to statutory offenses committed by the respondent, are not admissible as substantive proof for the purpose of convicting the accused, and are only competent to impeach the witness. *Id.* 356.

21. The records of the action of the common council, containing the reports of officials in the line of their duty in regulating a building in the interest of public safety, were improperly excluded as hearsay evidence, and were competent to prove the action of the municipal authorities. *Norris* v. *McFadden*, 425.

22. Testimony concerning the intoxicated condition of the deceased on the day he was killed is admissible in an action against a saloonkeeper for damages sustained by his wife on account of his death. *Sisson* v. *Lampert*, 509.

23. An objection that a hypothetical question is too long does not make the point that it contains facts which are not supported by the evidence. *Id.*

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EVIDENCE—Continued.

24. Testimony concerning the habits of the deceased in the use of intoxicating liquors during the period prior to the execution of the defendant's bond, is admissible for the purpose of showing the illegal nature of the sales and the right to exemplary damages. *Id.*

25. The prosecution is bound by the respondent's testimony on cross-examination relating to collateral matters, and cannot impeach him by showing that statements made by him relating to a distinct prosecution of a third person and not connected with the offense with which he was charged, were false. *People* v. *Williams*, 518.

26. No error is committed by the admission of testimony as a part of the *res gestæ* that the conductor stated he thought the plaintiff was off the car, where the conductor testified to the same fact on direct and cross-examination as a witness for the defendant. *Reese* v. *Detroit United Railway*, 600.

See CRIMINAL LAW (4, 11); DAMAGES (1); DEEDS (4, 7); DIVORCE (6); EASEMENTS (3); EMBEZZLEMENT (8, 9); EMINENT DOMAIN (1, 2); ESTOPPEL (2); HIGHWAYS AND STREETS (2); INCOMPETENCY; INSURANCE (2, 6, 10); INTOXICATING LIQUORS (4–7); JUSTICES OF THE PEACE (1); MASTER AND SERVANT (6); NEGLIGENCE (8, 10); PRINCIPAL AND SURETY (4); RAPE; REFORMATION OF INSTRUMENTS (2); SALES (4, 10, 11); STREET RAILWAYS (6, 7); TRESPASS TO PERSON (2–4); TRIAL (4, 5); UNDUE INFLUENCE (1, 2); WILLS (2).

EXAMINATION—See CRIMINAL LAW (10).

EXAMINATION OF WITNESSES—See TRESPASS TO PERSON (2).

EXCEPTIONS—See APPEAL AND ERROR (3).

EXCEPTIONS, BILL OF—See APPEAL AND ERROR (4, 5).

EXCESSIVE ALIMONY—See DIVORCE (8).

EXCESSIVE CLAIM—See MECHANICS' LIENS (2).

EXCESSIVE SPEED—See NEGLIGENCE (10).

EXCHANGE OF BUSINESS—See FRAUD (3).

EXCHANGE OF GOODS—See SALES (16, 18).

EXECUTION.

1. No action lies in favor of a stranger to the writ of execution against the officer making a levy under an execution upon property subject thereto and other intermingled property of such stranger who refuses to select the goods which belong to her. *McCausey* v. *Hoek*, 570.

2. The officer is required to make the selection if he can. *Id.*

See EXEMPTIONS (1, 2); INSURANCE (8); MANDAMUS (6); TRIAL (8).

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EXECUTORS AND ADMINISTRATORS.

1. The net personal estate for distribution consists of the personal property of the deceased after all debts and expenses, including debts secured by mortgage upon real estate of the deceased, have been deducted. *In re Fox's Estate*, 420.

2. The executor, under a will which grants to him full power and authority to make such disposition of the estate as may be necessary to carry into effect the provisions of the instrument, obtains title to the land coupled with a power of sale, and may maintain ejectment. 3 Comp. Laws, § 9354. *Moody* v. *Macomber*, 657.

See ESTATES OF DECEDENTS.

EXEMPLARY DAMAGES—See EVIDENCE (24).

EXEMPTIONS.

1. The selection of their statutory exemptions by merchants who gave a trust mortgage for the benefit of creditors is not conclusive upon a judgment creditor who did not accept rights under the trust, and he is entitled to attack the amount of such selection by an execution levy upon the property in the hands of an assignee who paid no consideration. *McCausey* v. *Hoek*, 570.

2. Where the assignee of such exempt stock, under a transfer without consideration, does not claim it as exemptions sold to her, the officer who makes a levy is not bound to set them off. *Id.*

EXPENSE MONEY—See DIVORCE (2).

EXPERT EVIDENCE—See EVIDENCE (17).

EXTENSION OF TIME—See APPEAL AND ERROR (9, 15).

EXTREME CRUELTY—See DIVORCE (1, 3, 5).

FENCES—See EASEMENTS (12).

FENCE VIEWERS—See TAXATION (1).

FIDUCIARY RELATION—See CONTRACTS (1).

FIRE INSURANCE — See INSURANCE (5–7); LIMITATION OF ACTIONS.

FIRES—See NEGLIGENCE (1–4).

FITNESS FOR PURPOSE—See SALES (1).

FOOD.

1. The sale by retailers to consumers of sausage made with the addition of cereal, and not labeled so that the public may know of the combination, although the product is properly labeled in the original package purchased at wholesale, is illegal under Act No. 193, Pub. Acts 1895, 2 Comp. Laws, § 5010 *et seq.*, being an adulteration within the prohibition of the act. *Armour & Co.* v. *State Dairy & Food Com'r*, 1.

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FOOD—Continued.

2. Sausage made of chopped pork, beef and veal with a filler of cereal, seasoned with salt and spices, and mixed with pure water, is not unwholesome or injurious to the health, and may be sold as a mixture or compound within the meaning of the statute, when labeled in such a manner as to show the consumer that it contains cereal. *Id.*

3. Sausage is an article of food composed of meat, salt, and spices. *Id*

FOREIGN CORPORATIONS—See ACTION (2, 3); CORPORATIONS (2–5); STREET RAILWAYS (1).

FORFEITURE—See CONTRACTS (5, 6); INSURANCE (4, 14); SALES (2–4).

FRANCHISES—See MANDAMUS (5).

FRAUD.

1. The expression of an opinion that the price of goods sold is cheaper than the buyer can procure them for elsewhere, does not constitute fraud although it is untrue. *Mayo* v. *Latham*, 186.

2. The holders of bonds of a corporation as security for materials furnished in constructing an electric railway are not precluded from sharing in the proceeds of such bonds on the foreclosure of the trust mortgage because they procured the bonds under a fraudulent statement of the purchase price in collusion with the contractors, to whom they intended to allow a secret rebate, but may participate in the division of the proceeds to the extent of their equitable claim. *Detroit Trust Co.* v. *Detroit, etc., Railway*, 442.

3. The defendants obtained an agreement from the complainants to exchange stock in a foreign corporation at par for the business of complainants, and after securing the contract doubled the capital stock of the defendant company, without making any additional payment or assessment, and without increasing the assets of the corporation. False representations were made as an inducement for the making of the exchange, to the effect that the defendants could make more money for the complainants, that the stock would pay six per cent. dividends, that the corporation could make large advances for the business, and that the business would improve; defendants also promised that the corporation would remove to Detroit and appoint complainants managers of departments. The promises were not performed. *Held*, that fraud was shown which would justify rescission in equity. *Allen* v. *Pulfer*, 616

See COMPROMISE AND SETTLEMENT; EQUITY PLEADING (3); ESTATES OF DECEDENTS (2); INSURANCE (1–4); LANDLORD AND TENANT (6); PLEADING; SALES (10–13).

FRAUDS, STATUTE OF.

1. An agreement not in writing between the owner of a farm to which he held title by foreclosure subject to redemption,

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FRAUDS, STATUTE OF—Continued.

and the person holding the equity of redemption, whereby the parties stipulated to sell the premises and divide the proceeds in proportion to their interests, is unenforceable as to a sale made seven years later, being void under the statute of frauds. *Mitchell* v. *Bilderbach*, 488.

2. Under the invalid agreement no trust could be created in proceeds which were not then in existence. *Id.*

See REFORMATION OF INSTRUMENTS (2); SALES (11); SPECIFIC PERFORMANCE.

FRAUDULENT CONVEYANCES.

In an action of replevin, a plaintiff corporation, which claims title to a stock of goods under a bill of sale executed by one of its customers, a hotel keeper, in the business of selling intoxicating liquors, and which is shown by evidence in the case to have taken the conveyance as security for a debt, leaving the property in the possession of the grantor, without recording its evidence of title in the office of the township clerk, is properly denied the right to recover the goods as against an officer who levied thereon in behalf of a judgment creditor of the hotel keeper, since the evidence tends to support the contention of defendant that the property was transferred in fraud of the creditors, and the transaction was presumptively fraudulent under 3 Comp. Laws, §§ 9520, 9521. *Grand Rapids Brewing Co.* v. *Pettis*, 679.

See TRIAL (7, 8).

GENERAL ISSUE, WAIVING OF—See PLEADING.

GOOD CHARACTER—See EVIDENCE (15).

GREAT LAKES—See BOUNDARIES.

GUESTS—See INTOXICATING LIQUORS (7).

GENERAL RELIEF—See CREDITORS' SUIT (2).

HABEAS CORPUS—See CRIMINAL LAW (9).

HABITS—See EVIDENCE (24).

HANDWRITING—See EVIDENCE (17).

HEALTH—See EMINENT DOMAIN (4).

HEARSAY EVIDENCE—See EVIDENCE (21, 26); INSURANCE (6); STREET RAILWAYS (7).

HIGHWAYS AND STREETS.

1. Section 4163, 2 Comp. Laws, requiring notice to be given to the adjoining owner before trees in the highway are cut, in order to give him an opportunity to remove them, only applies to trees growing upon the margin of the highway. *De Boer* v. *Adams*, 560.

2. A refusal of the plaintiff to state his authority for cutting the

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HIGHWAYS AND STREETS—Continued.

trees and undergrowth in the highway does not operate as an admission that he had no authority to act. *Id.*

See ADVERSE POSSESSION; EASEMENTS (7); MUNICIPAL CORPORATIONS (4); TRESPASS TO PERSON (1, 5).

HOMICIDE—See CRIMINAL LAW (1-4).

HUSBAND AND WIFE.

In the absence of testimony tending to show that a wife was authorized to sign a note in behalf of her husband, or borrow the amount in question, it is error to submit to the jury the question of her agency under the testimony that he had paid other notes so signed by her, to avoid trouble, and in the absence of a showing that he received any benefit from the transaction. *Jewett* v. *Bryant*, 346.

See EVIDENCE (5, 6, 11); MANDAMUS (8); PRINCIPAL AND AGENT (3).

HYPOTHETICAL QUESTIONS—See EVIDENCE (23).

IDENTITY—See EVIDENCE (8-10).

ILLEGALITY OF SALES—See INTOXICATING LIQUORS (3).

IMPEACHING WITNESS—See EVIDENCE (20, 25).

IMPROPER COMMENT—See CRIMINAL LAW (6).

IMPROPER CONDUCT OF PARTIES—See TRIAL (3).

INCOMPETENCY.

A man of 58 years of age who, although affected by Bright's disease, is able to comprehend the purpose of a transfer of insurance from his wife to his daughter, and whose intention appears rational, is properly held to have been competent to execute the transfer. *Andrews* v. *Lavery*, 26.

See CONTRACTS (1).

INCONSISTENT THEORIES—See CONTRACTS (5).

INCREASE OF HAZARD—See MASTER AND SERVANT (3).

INCUMBRANCES—See DEEDS (2-4, 6, 8, 13).

INDEMNITY BONDS — See CORPORATIONS (2); EVIDENCE (7); MUNICIPAL CORPORATIONS (2, 3, 5); PRINCIPAL AND SURETY.

INDEPENDENT CONTRACTOR—See NEGLIGENCE (1).

INDICTMENT AND INFORMATION.

1. An information which charges an offense under videlicet on August 18th, may be properly amended by changing the date to July 18th. 3 Comp. Laws, §§ 11919, 11936. *People* v. *Nichols*, 355.

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INDICTMENT AND INFORMATION—Continued.

2. Where the information charged respondent with an offense on, "to wit, July 18th," and the prosecuting attorney in his opening statement announced that he relied on an act committed about a week prior to July 18th, evidence of an offense committed two weeks before that date was admissible. *Id.*

See EMBEZZLEMENT (1, 6).

INFANTS—See NEGLIGENCE (12).

INFERENCES—See SALES (14); UNDUE INFLUENCE (1).

INHERITANCE TAX—See TAXATION (8, 9).

INJUNCTION.

1. The injunction, not being a writ of right, will be denied to a complainant who rented premises for the lessee's business, known to the lessor at the time, under the terms of a written lease which in effect prohibited the use of the premises for such business because of the increased hazard of fire. *Campau* v. *National Film Co.*, 170.

2. An injunction may be withheld if it is likely to inflict greater injury than the grievance complained of. *Id.*

3. In a suit to enjoin the enforcement of a judgment in proceedings at law for the possession of land, an order of the circuit judge, after hearing the cause on the merits, providing that the preliminary injunction be dissolved, and unless complainant secure the defendant for the rental value of the premises pending her appeal from a decree dismissing the bill, in addition to the statutory appeal bond, the judgment at law should be enforced, is a discretionary matter which will not be reversed on mandamus. *Hulan* v. *Wayne Circuit Judge*, 605.

4. The dissolution of a preliminary injunction is largely within the discretion of the circuit judge. *Id.* 606.

5. A preliminary injunction which has been dissolved on the coming in of defendant's answer upon motion, or upon the final hearing, is not revived by the appeal. *Id.*

6. After such dissolution, if the complainant who has appealed have just cause for apprehension, he may apply to the Supreme Court for an injunction to preserve the *status quo*. *Id.*

7. An injunction staying proceedings at law in a pending case does not affect the validity of the judgment therein, obtained in disobedience of the injunction. *Id.*

8. Averments on information and belief in a bill to obtain an injunction do not justify the issuance of a preliminary writ. *Allen* v. *Wayne Circuit Judge*, 612.

9. Such averments are sufficient to obtain an order to show cause and would justify the temporary injunction if supported by proper evidence. *Id.*

10. The omission of a necessary party to a suit for an injunction

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INJUNCTION—Continued.

to restrain a municipality from constructing a fire department building on lots which were sold subject to a plan restricting buildings on the street to residences will not prevent the issuance of a temporary injunction. *Id.*

11. Such restrictions are binding upon a municipality as well as an individual, and the rights so obtained by adjoining purchasers must be acquired by purchase or condemnation before a lot subject to such restrictions may be used in violation of their terms. *Id.*

2. Mandamus will not lie to compel the issuance of a temporary injunction on a bill sworn to on information and belief, unsupported by positive testimony. *Id.*

See APPEAL AND ERROR (11); EASEMENTS (7); EQUITY PLEADING (2); INSURANCE (1); MANDAMUS (4, 5, 7).

INSANITY—See CRIMINAL LAW (2, 8).

INSOLVENCY.

A bill of complaint sufficiently alleges insolvency which shows that the defendant corporation owes more than it can pay, that suits have been brought against it and judgments rendered which the company cannot pay. *Kimmerle* v. *Dowagiac Gas Co.*, 84.

See ACCOUNTING (2).

INSTRUCTIONS—See ANIMALS; CRIMINAL LAW (1, 5); INTOXICATING LIQUORS (7); NEGLIGENCE (7, 9); SALES (13, 14); TRESPASS TO PERSON (5); TRIAL (1, 2).

INSURANCE.

1. A policy of insurance procured by the beneficiary named in it on the life of his father, under false representations made as to the age of the insured and as to the rejection of insurance by other companies, may be annulled in equity at the suit of the insurer, and an action at law on the policy enjoined. *Metropolitan Life Ins. Co.* v. *Freedman*, 114.

2. The acceptance and retention by the insured of a policy which contains a copy of the false representations made in the application for insurance furnishes evidence of a fraudulent intent. *Id.*

3. The fact that false representations as to the rejection of the deceased by other companies were made by the agent for a company which had accepted the deceased as a risk, is not a defense to such suit in favor of the beneficiary who knew of the falsity of the statements and conspired with the agent to secure the policy. *Id.*

4. Premiums paid upon a policy in which a clause was incorporated providing that they should be forfeited in case the application contained fraudulent representations, should be returned if the policy is rescinded by the decree, although they could not be recovered in an action by the insured. *Id.*

5. The refusal of the trial court to permit, after the closing of

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INSURANCE—Continued.

plaintiff's evidence, an amendment of the plea and notice of defense, so as to set up the defense of change of title in plaintiff, is discretionary. *O'Toole* v. *Ohio German Fire Ins. Co.*, 187.

6. Evidence in rebuttal that plaintiff, before being accused of any offense, called up the sheriff by telephone and urged him to investigate the fire, is competent to disprove her guilt. *Id.*

7. The levy of an attachment on insured property, without the knowledge of the owner, subsequent to the issuance of the policy, is insufficient to avoid the policy. *Id.*

8. In an action on a life insurance policy which had never been delivered to the insured during his lifetime, and on which the first premium was not paid, the defense that the nonpayment of the premium was in violation of the express terms of the agreement, was not waived by a letter refusing to furnish blank proofs of loss on the ground that no delivery had been made and the first payment was not received by the company or its agent. *Dennis* v. *Fidelity Mutual Life Ins. Co.*, 594.

9. The consent of an agent for a life insurance company to accept a note for part of the first payment on a policy which was not delivered to the insured before his death, the note never having been executed, is not a waiver of the condition in the policy requiring full payment as a condition precedent. *Id.*

10. It was not error to exclude from evidence testimony tending to show that the premium was charged by the defendant to its agent, that statements of the amount due had been mailed to the insured, that the agent had given a bond to secure the company and that the policy had been returned to the company, after an unauthorized delivery, by reason of threats. *Id.* 595.

11. The commissioner of insurance will not be required by mandamus to approve insurance policies of the relators which include a clause that if any premium, note or portion thereof is not paid when due the policy shall be void, the provision being a material change from the requirements of Act No. 187, Pub. Acts 1907, as to the payment of the first premium in advance, and subsequent premiums within thirty days. *Franklin Life Ins. Co.* v. *Commissioner of Insurance*, 636.

12. A policy of insurance against damage by tornado, issued in the name of an owner, who at the time of the issuance was under contract to convey the property to a corporation, of which he was a stockholder, and who subsequently conveyed the same without the consent of the insurer, is void under a clause in the policy by which the policy is declared invalid if the insured was not the sole and unconditional owner, and if any conveyance should be made without the consent of the company. *Dull* v. *Royal Ins. Co.*, 671.

13. If an agent for an insurance company is personally interested in the property insured, no policy issued by him thereon, or

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INSURANCE—Continued.

act done by him in connection therewith, binds the insurance company unless it knows of and assents to the situation. *Id.*

14. The defense of forfeiture for a change of title is not waived by omitting to claim a forfeiture in the first letter written by the insurance company to the insured, which stated that the matter would be referred to its agent, where a subsequent letter expressly claimed the right to rely on all defenses. *Id.*

See ACTION (8); CONTRACTS (1); INCOMPETENCY; LIMITATION OF ACTIONS; PRINCIPAL AND AGENT (1, 5); PRINCIPAL AND SURETY (3); UNDUE INFLUENCE (2).

INTENT—See EMBEZZLEMENT (7); INSURANCE (2); SALES (12, 13); WILLS (7).

INTENTION—See TRUSTS.

INTEREST—See REAL PROPERTY (1); USURY.

INTERMINGLED GOODS—See EXECUTION.

INTERNATIONAL LAW—See CONSTITUTIONAL LAW (1, 2); WILLS (1).

INTERURBAN CARS—See MANDAMUS (5).

INTOXICATING LIQUORS.

1. Testimony that a witness purchased beer of the respondent in a local-option county, warrants a conviction without proof of its intoxicating qualities. *People* v. *Anderson*, 185.

2. A druggist may not lawfully sell intoxicating liquors to be drunk on the premises without paying the tax and obtaining the license required of retail dealers. 3 Comp. Laws, § 5279. *Stewart* v. *Calhoun Circuit Judge*, 229.

3. A charge in an information that the defendant, a druggist, and person engaged in part in the sale of drugs and medicines, sold intoxicating liquors to be used as a beverage and drunk on the premises, sufficiently negatives the lawfulness of the sales. *Id.*

4. No error was committed by the trial court, in an action for the death of plaintiff's husband, under the law regulating the sale of intoxicating liquors, in submitting to the jury as a question of fact whether liquor was sold by the defendant to the deceased on the night he was killed, where the testimony showed that he was drinking in the defendant's saloon at the time, and the witness and defendant might have seen the deceased from the position in which both were situated, although the facts were disputed. *Baessler* v. *Foster*, 518.

5. Where a respondent was charged with furnishing intoxicating liquors to one of a number of berry pickers, in violation of the local-option law, evidence of similar offenses relating to other berry pickers at about the same time is competent to show intent and to rebut any inference of mistake or accident. *People* v. *Giddings*, 528.

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INTOXICATING LIQUORS—Continued.

6. It was error to admit testimony that another witness procured intoxicating liquor of the respondent's employé, out of a bottle on the person of the latter, the respondent being in no wise connected with the transaction. *Id.*

7. Requested instructions to the jury were properly refused where they submitted the question whether the intoxicants were furnished to a guest, and the theory was unsupported by evidence on either side. *Id.*

See CONSTITUTIONAL LAW (13); EVIDENCE (22, 24).

INVITATION TO ENTER UPON PREMISES—See NEGLIGENCE (5).

ISSUES—See EMINENT DOMAIN (5).

JOINT DEFENDANTS—See EQUITY (2).

JOINT INTERESTS—See PARTITION.

JOINT OBLIGATIONS—See PARTNERSHIP.

JOINT OWNERSHIP—See LANDLORD AND TENANT (2).

JUDGES—See CONSTITUTIONAL LAW (11).

JUDGMENT.

1. A decree in equity determining the validity of a drain tax is *res adjudicata* in subsequent proceedings for the sale of the land for unpaid taxes, when the same ground of objection to its validity was set up by the owner in his pleading in the prior suit. *Auditor General* v. *McCall*, 318.

2. A party is concluded by a judgment determining the validity of a tax with respect to all reasons which he might have urged against it. *Id.*

See CREDITORS' SUIT (1); EQUITY (4); EQUITY PLEADING (2); ESTATES OF DECEDENTS (1, 2).

JUDGMENT AT LAW—See INJUNCTION (3, 7, 8).

JUDGMENT CREDITORS—See FRAUDULENT CONVEYANCES (1).

JUDICIAL NOTICE—See CRIMINAL LAW (11); EVIDENCE.

JUDICIAL POWERS—See CONSTITUTIONAL LAW (7).

JURISDICTION—See APPEAL AND ERROR (12); ATTACHMENT (3); ATTORNEY AND CLIENT (3); CANCELLATION OF INSTRUMENTS (1); JUSTICES OF THE PEACE (3); WILLS (1).

JURY—See TRIAL (3).

JUSTICES OF THE PEACE.

1. After the removal of a cause by appeal from justice's to circuit court the justice's return to a writ of certiorari is of no effect and is incompetent as evidence in aid of a motion to dismiss the appeal. 1 Comp. Laws, § 918. *Swantek* v. *Jarmoszka*, 99.

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JUSTICES OF THE PEACE—Continued.

2. Under Act No. 475, Local Acts 1903, giving justices of the city of Detroit authority to grant motions for new trial, the hearing and determination of the motion by the court in the absence of counsel for one of the parties who had appeared at the time for which the motion was noticed, and left because the opposite counsel did not appear, is valid where the justice returned on a motion to vacate the order granting a new trial, that upon the showing made by the respective parties he thought a new trial should be granted. *National Cash Register Co.* v. *Richards*, 128.

3. A justice of the peace, who adjourns an action against the objection of one party without a sworn showing of cause, loses jurisdiction. 1 Comp. Laws, § 791. *Adams & Ford Co.* v. *Cullen*, 669.

See CRIMINAL LAW (10, 12).

JUSTIFICATION—See EXECUTION; TRESPASS TO PERSON (1).

LACHES—See EQUITY (3, 6).

LAND CONTRACTS.

1. In an action on a land contract brought by the vendor without a prior tender of a deed, the measure of damages is the difference between the purchase price payable under the contract and the value of the land at the time of the breach. *Carter* v. *Reaume*, 160.

2. A judgment for nominal damages will not be awarded on error in a case where the question was not presented to the trial court. *Id.*

3. Separate items of taxes paid more than ten years prior to the commencement of the action, except in so far as they might be included in the total sum due, under a clause providing that they might be added thereto, are barred by the statute of limitations and are not recoverable as a part of the contract price unless a deed was tendered. *Id.*

LANDLORD AND TENANT.

1. Under an agreement between the owner of land and a third person renting the ground on shares, and dividing in advance the corn to be planted on the premises by assigning to the owner every third row of shocks, beginning at the south side, the owner had title to such of the standing corn as in the course of good husbandry would be put into the first, fourth, etc., rows of shocks, without reference to any division by the tenant. *Schultz* v. *Dennison*, 259.

2. Title to the landlord's interest passes to a joint owner who obtains his title to a portion of the rented real property by uncontested proceedings in partition, as by a voluntary conveyance without a reservation of the crops. *Id.*

3. The lease by the owner of a building consisting of several stories, to a merchant, of the first story and basement for use in his business, with license to use the roof for a sign or signs,

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LANDLORD AND TENANT—Continued.

confers no right to sublet the privilege of using the roof to another person to advertise a separate business, but merely a personal right to advertise the business carried on under the lease. *Forbes* v. *Gorman*, 291.

4. The lessee of one story of a building obtains the right to use the premises, including the outer and inner walls, for all purposes not inconsistent with the lease, and may put any sign or signs on the walls which work no injury to the freehold. *Id.*

5. No right is acquired by estoppel in favor of a tenant who permits a third person for a specified rent to erect a sign on the roof of a building of which he rents a portion, against the owner whose agent discovers the sign in process of erection, and who was not informed of the purpose or compensation for the arrangement. *Id.* 292.

6. In an action for the rent of a building leased to the defendant for use as a theater, unfit for that purpose, and known by the landlord so to be, because of its inflammable condition and because of the action of the common council requiring certain changes, before allowing it to be used for theatrical purposes, it is not an answer to the claimed defense that the defendant might have seen the condition of the theater when, in fact, he did not know of the requirements of the common council as to the safety of the building leased. *Norris* v. *McFadden*, 424.

7. Under a clause in the lease providing that certain specified changes should be made by defendant in strict accordance with the law of the State and the local ordinances, the duty of placing the building in safe condition, as required by the action of the municipality, did not devolve upon the tenant, who thereby merely undertook to make the alterations intended, in accordance with law. *Id.* 425.

8. Placing firemen in the building in the interest of public safety was not a trespass which excused the plaintiff from placing his premises in suitable condition for the purposes intended by the lessee. *Id.*

9. Recoupment lies for the damages sustained by a tenant because of a landlord's default in placing the premises in suitable condition for use as a theater, notwithstanding a partial compliance with the municipal requirements, if the jury find the tenant surrendered the premises because of the default. *Id.*

See DEEDS (3, 5); ESTOPPEL (1); INJUNCTION (1); NEGLIGENCE (1); REFORMATION OF INSTRUMENTS (1).

LAWS OF FOREIGN COUNTRIES—See EVIDENCE (1).

LEASE—See DEEDS (3, 13); INJUNCTION (1); LANDLORD AND TENANT (3, 7, 8); REFORMATION OF INSTRUMENTS (1).

LEVY—See ATTACHMENT (2); DAMAGES (3).

LEWDNESS—See CRIMINAL LAW (8).

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LICENSES — See CONTRACTS (3, 6); INTOXICATING LIQUORS (2); NEGLIGENCE (5, 6).

LIEN CLAIMANTS—See MECHANICS' LIENS (3, 4).

LIENS—See ATTACHMENT (2); MECHANICS' LIENS; RAILROADS.

LIFE ESTATES—See EQUITY (7); REAL PROPERTY.

LIFE INSURANCE—See INCOMPETENCY; INSURANCE (8–10).

LIGHTS—See MASTER AND SERVANT (5–8, 13); NEGLIGENCE (11).

LIMITATION OF ACTIONS.

The statute of limitations begins to run against an assessment of stockholders in a mutual insurance company, assessed by the receiver under an order of the court, from the date when notice of the assessment was served, not from the end of the period named therein for payment although the notice stated that suit would be brought after thirty days from such service. *Pratt* v. *Broadwell*, 875.

See LAND CONTRACTS (3).

LIMITATIONS, STATUTE OF—See EQUITY (4); LAND CONTRACTS (3); LIMITATION OF ACTIONS.

LOCAL-OPTION LAW—See INTOXICATING LIQUORS (1, 5, 6).

LOCAL SELF-GOVERNMENT—See CONSTITUTIONAL LAW (9, 12).

LOCAL TAXES—See TAXATION (3).

LOCATION OF WAY—See EASEMENTS (11).

LOCUS—See ACTION (1, 2).

LOGS AND LOGGING—See CONTRACTS (3).

LOSS OF PROFITS—See DAMAGES (5).

MACHINERY—See SALES (1).

MAINTENANCE OF WAY—See EASEMENTS (12).

MALICE—See TRESPASS TO PERSON (3).

MALICIOUS PROSECUTION.

1. The defendant in an action of replevin, in whose favor the action was decided, cannot maintain case for malicious prosecution of the civil action where he had sold the property previously to its seizure under the writ of replevin, and had no property interest in the chattels taken. *Powers* v. *Houghton*, 372.

2. In an action for malicious prosecution, the defense that probable cause was shown and that the facts were fully and fairly stated to the prosecuting attorney, who directed the commencement of the proceeding, is a question of fact, where it appears that the plaintiff was arrested for the malicious destruction of trees growing along the highway which the evi-

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MALICIOUS PROSECUTION—Continued.

dence tended to show were a nuisance and were cut by the plaintiff under the direction of the overseer of highways, and it further appeared that the defendant stated the facts within his knowledge to the prosecuting attorney who directed the issuance of a warrant, but that the defendant omitted to state to the prosecutor that the growth had been previously cut by the public authorities, or that he was informed that the authorities intended to cut them again. *De Boer* v. *Adams*, 560.

MANDAMUS.

1. Mandamus will not issue to compel the board of assessors to strike from the roll an assessment upon personal property erroneously determined to belong to relator, the remedy at law being adequate. 1 Comp. Laws, § 3876. *W. A. Sturgeon & Co.* v. *Board of Assessors of the City of Detroit*, 199.

2. It is a general rule that mandamus will not issue where it would be unavailing; and the rule is applicable where, in the usual course, a mandamus proceeding could not be determined before the assessment roll has left the hands of assessors to whom the writ should be directed. *Id.* 200.

3. The prayer of a petition for mandamus cannot be granted where it asks that an assessment be struck from the rolls and shows that the relator is liable to assessment upon a portion of the valuation. *Id.*

4. The issuance of a temporary injunction restraining a claimant to the office of township clerk from interfering with the officer in possession, and holding over under a claim of right after an alleged tie vote at the election, is not such an improper exercise of discretion that the writ will be dissolved by mandamus. *Murphy* v. *Montmorency Circuit Judge*, 392.

5. On mandamus to compel a circuit judge to dissolve a temporary injunction restraining a street railway company from operating interurban cars on the street railway tracks in the city of Kalamazoo, under a franchise that the company claimed authorized such user, the right to a final restraining order not being clear, and the public sustaining no injury from continued operation of the cars, the injunction is ordered dissolved. *Michigan United R. Co.* v. *Kalamazoo Circuit Judge*, 399.

6. The entry of an order in circuit court requiring the issuance of an execution to collect the sum specified in a decree of the Supreme Court on accounting will be compelled by mandamus. *Gaskill* v. *Jackson Circuit Judge*, 472.

7. An order of the Michigan railroad commission fixing a minimum rate for excess baggage to be charged by steam railroads, not confiscatory in amount, is enforceable by mandamus although a proceeding in equity is pending on appeal in the Supreme Court for a determination of the legality of the action of such commission; an injunction to restrain the enforcement of the order having been denied in the chancery proceeding. *Michigan Railroad Commission* v. *Michigan Cent. R. Co.*, 580.

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MANDAMUS—Continued.

8. An order in divorce proceedings awarding to the wife possession of certain furniture will not be set aside in mandamus when it does not appear to be unjust and the legal right to the possession under the order is reviewable on appeal, as from a final order. *Price* v. *Kent Circuit Judge*, 614.

See APPEAL AND ERROR (9, 15); CARRIERS (1); CORPORATIONS (5); EMINENT DOMAIN (5); INJUNCTION (3, 12); INSURANCE (11); NEW TRIAL (2); VENUE (1).

MANSLAUGHTER—See CRIMINAL LAW (1–3).

MASTER AND SERVANT.

1. The failure of an employer to furnish sound lumber for a scaffold for an employé engaged in the work of putting up storm windows, and not familiar with the requirements of scaffolding, is evidence of negligence. *Carnell* v. *Halpin*, 42.

2. Going to meals and taking dinner to his co-employés is not outside the scope of the employment of a section hand. *Moyer* v. *Ann Arbor R. Co.*, 645.

3. The increase of danger in riding upon an engine is an obvious risk, assumed by the servant. *Id.*

4. The fact that a rule employed by a railroad company is a modification of one used by another company, which was not shown to result in greater safety to life and property than the defendant's rule would secure, does not justify the submission of the question of its sufficiency to the jury, where obedience to the rule adopted by defendant would have averted the injury. *Id.*

5. Testimony that an electric light, placed near an aperture in a mine shaft, was not burning after the plaintiff was injured, and that the bulb had been broken, tends, although contradicted, to prove a material question of fact in an action for negligent failure to provide proper illumination. *Kaukola* v. *Oliver Iron Mining Co.*, 689.

6. A question of fact as to the purpose of such light is presented by testimony of superior servants of the defendant that it was provided so that the men might walk with safety, and to protect them. *Id.*

7. The duty to maintain proper lights in a mine so that employés in getting to and from work might avoid a dangerous opening in a level arises from the nondelegable duty of the master to provide a safe place. *Id.*

8. Under uncontradicted evidence that the servant did not know of a dangerous opening in a dark portion of the mine in which he was employed, that the hole was not much more than a foot in apparent width when seen from certain positions, and was improperly lighted, raises a question of fact for the jury as to his constructive knowledge of the danger. *Id.*

9. The servant would be held to have assumed the risk if the opening was such as would not escape ordinarily careful observation. *Id.*

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MASTER AND SERVANT—Continued.

10. The employer must furnish a suitable place where the servant, with due care, may perform his work without being exposed to any but the ordinary dangers of his occupation. *Id.*

11. The servant is not bound to familiarize himself with all the machinery and appliances which he does not use himself. *Id.*

12. The servant has a right to presume that his safety has been reasonably provided for, and, in general, may use a walk or appliance without first particularly inspecting it. *Id.* 690.

13. Whether the absence of sufficient light was the proximate cause of the servant's injury, and whether he was guilty of contributory negligence, were questions of fact. *Id.*

See NEGLIGENCE (1).

MATERIALMEN—See CONTRACTS (2).

MATURITY OF ACCOUNTS—See SALES (15).

MAXIMS—See EQUITY (5).

MECHANICS' LIENS.

1. A materialman who files a mechanic's lien is not estopped by the fact that, without bad faith, he claimed more than was due him. *Frohlich* v. *Ashton*, 265.

2. Where the mistake in claiming a mechanic's lien for an excessive amount is an honest one, the lien is not lost. *Id.*

3. In determining the amounts to be paid each of the lienors, the cost of the building, where the contractor defaults and compels the owner to complete the building, includes not only liens which have been allowed but all unpaid creditors for material and labor furnished. *Id.*

4. A manufacturer who furnishes machinery for the power plant of an electric railway is not entitled to a mechanics' lien under 3 Comp. Laws, § 10710; Act No. 17, Pub. Acts 1903. *Detroit Trust Co.* v. *Detroit, etc., Railway*, 442.

MINES AND MINING—See MASTER AND SERVANT (5, 7, 8); NEGLIGENCE (5).

MISNOMER—See ATTACHMENT (1).

MISTAKE—See CANCELLATION OF INSTRUMENTS (1); REFORMATION OF INSTRUMENTS (3, 4).

MITIGATION OF DAMAGES—See DAMAGES (6).

MORTGAGES—See EVIDENCE (14); FRAUDULENT CONVEYANCES; RAILROADS; REAL PROPERTY.

MOTIONS—See APPEAL AND ERROR (8); NEW TRIAL (1); VENUE (1).

MOTOR VEHICLES—See NEGLIGENCE (10-12).

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MUNICIPAL CORPORATIONS.

1. The conveyance to the city of Detroit of property for a boulevard, by a deed referring to Act No. 388, Local Acts 1889, creates an implied contract to raise funds for improvements by general taxation as provided in the act, and is not affected by its repeal under a proviso that rights acquired under the repealed law should not be impaired. *Scovel* v. *City of Detroit*, 95.

2. A contract is executed for public works within the meaning of 8 Comp. Laws, § 10743 when a construction company submits a proposal which is accepted and the work completed upon the giving of statutory bonds for the performance of the work and payment for materials and labor, although no formal contract was executed. *Kuennan* v. *United States Fidelity & Guaranty Co.*, 122.

3. It is the duty of public officials of a municipal corporation to secure a compliance with the statute governing the construction of public buildings and works. *Id.* 123.

4. A grating which projects two inches or less above a sidewalk is not such a defect as to violate the duty of a municipality to keep its streets and walks in a condition of reasonable safety. *Northrup* v. *City of Pontiac*, 250.

5. A city which procures a bond from contractors who construct public buildings or works, running in terms to the city for the benefit of materialmen, etc., as obligee, instead of to the people as provided by statute, may bring action on the instrument for the benefit of persons who were intended to receive protection. *City of Alpena, for use of Besser*, v. *Title Guaranty & Surety Co.*, 329.

6. The rule that a local board of supervisors may not change the boundaries of a municipality under Act No. 215, Pub. Acts 1895, 1 Comp. Laws, § 2974, where the legislature has intervened by special act and made such change, subsequent to the enactment of the general law, is not applicable to the change in the boundary of the city of Benton Harbor under the general law, in view of subsequent special acts of the legislature expressly providing that the general law should govern that municipality. *City of Benton Harbor* v. *Cutler*, 364.

See CONSTITUTIONAL LAW (7, 9); EVIDENCE (2, 21); INJUNCTION (10, 11); LANDLORD AND TENANT (6, 9); PRINCIPAL AND SURETY (5-7); TAXATION (4, 7).

MURDER—See CRIMINAL LAW (2-4).

MUTUAL FIRE INSURANCE COMPANIES—See LIMITATION OF ACTIONS (1).

NAME—See ATTACHMENT (1).

NECESSITY—See EMINENT DOMAIN (1, 4).

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NEGLIGENCE.

1. The owner of land who agrees with a tenant to pay a specified sum per acre for clearing his land, is not liable, as for the neglect of a servant, for damage done by the tenant in setting fires which escaped on adjacent property, the relation being that of an independent contractor. *Rogers* v. *Parker*, 278.

2. If the thing to be done is in itself unlawful, or if it is *per se* a nuisance, or if it cannot be done without doing damage, he who causes it to be done by another, be the latter servant, agent, or independent contractor, is as much liable for injuries which may happen to third persons from the act done as though he had done the act in person. *Id.*

3. Setting of fires in the process of cultivation is not unlawful. *Id.* 279.

4. 3 Comp. Laws, §§ 11653–11658, creates a liability for the escape of fires from the owner's premises, when it is the result of personal negligence or a wilful act. *Id.*

5. Where a miner, injured in an explosion, had applied for work to defendant's pit boss, who told him to return on a subsequent day, when he again went and made application to defendant's superintendent who referred him to the pit boss, whom he then attempted to find on defendant's premises, it is a question of fact for the jury whether an express or implied invitation to be on the premises might not be inferred from the conversation. *Schmidt* v. *Michigan Coal & Mining Co.*, 308.

6. After the owner of premises is aware of the presence of a trespasser or licensee, or if, in the exercise of ordinary care, he should know of his presence, it is his duty to use ordinary care to prevent injury to him arising from active negligence. *Id.*

7. All question of the defendant's failure to warn the plaintiff, an employé of a distinct corporation, who was stationed on defendant's logging train unloading timber, was withdrawn from the jury by an instruction that no warning was necessary, because the plaintiff knew the train was about to start. *Morrill* v. *Detroit, etc., R. Co.*, 478.

8. Testimony concerning the usual movement and jerking of the cars was competent to refute the defendant's theory and evidence that the usual and ordinary motion of the cars caused the injury. *Id.*

9. It was sufficiently favorable to the defendant to charge the jury that, if the engineer started the train in the manner that an ordinarily prudent engineer would have done, there was no negligence. *Id.* 479.

10. That an automobile was exceeding the speed limit or was running at an excessive rate is not shown by testimony that it was running a good deal faster than a horse trots, and went pretty fast. *Zoltovski* v. *Gzella*, 620.

11. Absence of lights on an automobile in violation of Act No.

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NEGLIGENCE—Continued.

196, Pub. Acts 1905, as amended by Act No. 804, Pub. Acts 1907, constitutes negligence. *Id.*

12. A child of 13 years who runs across a public street without looking for any vehicle which might be coming, is guilty of contributory negligence precluding recovery for injuries received by being run down by an automobile. *Id.* 621.

See CARRIERS (2); DEATH BY WRONGFUL ACT; MASTER AND SERVANT (1, 5, 6, 10, 12, 13); MUNICIPAL CORPORATIONS (4); STREET RAILWAYS (4–7); TRIAL (4).

NEW TRIAL.

1. In the absence of a request for more specific reasons for the denial of a motion for a new trial, a case which contains no prejudicial error will not be reversed on appeal for the reason that the lower court made a general finding that he found no grounds for awarding a new trial. *Board of Education of Grand Rapids* v. *Brown*, 148.

2. *Quære*—Is mandamus the proper remedy to compel the trial judge to file more specific reasons for denying a new trial? *Id.* 149.

See APPEAL AND ERROR (3, 8); JUSTICES OF THE PEACE (2).

NOMINAL DAMAGES—See CORPORATIONS (6); DAMAGES (2); LAND CONTRACTS (2).

NONPERFORMANCE—See LANDLORD AND TENANT (8).

NOTARY PUBLIC—See TRIAL (2).

NOTICE—See ANIMALS; ATTACHMENT (1); EASEMENTS (2, 3); EQUITY (6); PRINCIPAL AND AGENT (2); PRINCIPAL AND SURETY (1); SALES (4); SPECIFIC PERFORMANCE.

NOTICE OF DEFENSES—See INSURANCE (5).

NOVATION—See ACCOUNTING (1).

OBJECTIONS—See APPEAL AND ERROR (10); EVIDENCE (23); TRIAL (3).

OBVIOUS RISK—See MASTER AND SERVANT (3).

OPINION—See FRAUD (1, 3).

OPINION EVIDENCE—See EVIDENCE (4).

OPINION OF JUDGE—See TRIAL (2).

ORDER TO SHOW CAUSE—See INJUNCTION (9).

OVERCHARGE—See MECHANICS' LIENS (1,2).

PAROL AGREEMENT—See FRAUDS, STATUTE OF.

PAROL ANTENUPTIAL AGREEMENT—See CONTRACTS (1).

PAROL CONTRACT—See SPECIFIC PERFORMANCE.

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PAROL DECLARATION—See TRUSTS.

PAROL EVIDENCE—See DEEDS (4, 7); EVIDENCE (3, 12); REFORMATION OF INSTRUMENTS (2); SALES (11); WILLS (2).

PARTIES—See ACTION (2, 3); APPEAL AND ERROR (4); ATTACHMENT (3); EJECTMENT; EQUITY (2); INJUNCTION (10); MUNICIPAL CORPORATIONS (5); PARTNERSHIP; TAXATION (2, 7).

PARTITION.

It is competent for the court to adjust the equities of parties to a partition proceeding in the decree. *Schultz* v. *Dennison*, 259.

See LANDLORD AND TENANT (2).

PARTITION FENCES—See TAXATION (1).

PARTNERSHIP.

1. A partnership may not bring an action at law against one of its members, who would be both plaintiff and defendant in the same cause. *Kalamazoo Trust Co.* v. *Merrill*, 649.

2. An obligor, who is liable jointly and severally on a note, cannot be held in an action at law by one of the parties jointly liable with him until such co-obligor has paid the note or more than his proportion thereof; and then, only for contribution. *Id.*

3. A copartnership, three of whose members are liable as makers or indorsers on a promissory note, and thereby disabled from bringing an action against a third person who is jointly and severally liable as their co-obligor, may not maintain an action against him on the obligation, and is limited to a suit in equity. *Id.*

4. The right of such defendant is not in the nature of a set-off or contribution, but consists of a right to the adjustment of equities existing against those holders who are equally liable with himself. *Id.*

5. The trustee in bankruptcy of a copartnership cannot bring such action if it might not be maintained by the bankrupt. *Id.* 650.

PAVING TAX—See TAXATION (4-7).

PEDESTRIANS—See DEATH BY WRONGFUL ACT; NEGLIGENCE (12).

PERFORMANCE—See CONTRACTS (4).

PERJURY—See TRIAL (2).

PERSONAL ESTATE—See EXECUTORS AND ADMINISTRATORS (1).

PERSONAL INJURIES—See CARRIERS (2); MASTER AND SERVANT; NEGLIGENCE (5-12); STREET RAILWAYS (4-7); TRESPASS TO PERSON (1); TRIAL (4).

PERSONAL LIABILITY—See TAXATION (1-3).

PERSONAL PROPERTY—See MANDAMUS (1, 2); SALES (2, 17).

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PLEADING.

A plea and notice which admit the right of the plaintiff to recover except for alleged fraud in the procurement of a contract for the sale of goods, and which claim the right to open and close the case, and waive the benefit of the general issue, admit the delivery and acceptance of the goods. *Providence Jewelry Co.* v. *Bailey*, 285.

See ACCOUNTING (2); APPEAL AND ERROR (2); CONTRACTS (5); CORPORATIONS (1); DAMAGES (1); EMINENT DOMAIN (4, 5); EQUITY; EQUITY PLEADING; ESTATES OF DECEDENTS (2); INJUNCTION (8); INSOLVENCY; INSURANCE (5); INTOXICATING LIQUORS (3); QUO WARRANTO (1, 3); STREET RAILWAYS (3).

PLEDGE—See FRAUD (2).

POLICE REGULATIONS—See EVIDENCE (21); LANDLORD AND TENANT (6, 9).

POSSESSION—See EJECTMENT (1); REFORMATION OF INSTRUMENTS (5); SALES (2, 6, 17).

PRACTICE—See DIVORCE (6); PLEADING.

PRELIMINARY EXAMINATION—See CRIMINAL LAW (11–14).

PREMIUMS—See INSURANCE (4, 8–11).

PRESCRIPTION—See EASEMENTS (2–4).

PRESUMPTIONS—See CRIMINAL LAW (13); EVIDENCE (1); MASTER AND SERVANT (12).

PREVIOUS ACTS—See EVIDENCE (19).

PRINCIPAL AND AGENT.

1. An agent who takes a risk and issues a policy of insurance is a general agent. *Crystal Ice Co.* v. *United Surety Co.*, 102.

2. Notice of the vicious character of the defendant's dog may be imputed to the defendant from the fact that his servant, who had charge of and managed his farm, knew of attacks made by the dog on other persons and on animals in the highway. *Meilke* v. *Schabble*, 163.

3. The payee of a note who does not know that the maker holds out his wife as an agent to execute paper, and who takes the note in reliance on the genuineness of the maker's signature, may not recover on the theory that she relied on the wife's agency to execute the instrument. *Jewett* v. *Bryant*, 346.

4. One who holds out another as his agent to borrow money is estopped to deny the authority as against another who knows of and relies on the apparent authority. *Id.*

5. An agent cannot represent and bind two parties having opposing interests in the same transaction, nor can he be at the same time a party and an agent of the opposite party, unless all persons in interest know of the dual relation and assent to it. *Dull* v. *Royal Ins. Co.*, 671.

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PRINCIPAL AND AGENT—Continued.

See BROKERS; HUSBAND AND WIFE; INSURANCE (9, 13); NEGLIGENCE (2); PRINCIPAL AND SURETY (1, 2); SALES (18); WITNESSES.

PRINCIPAL AND SURETY.

1. It is not a defense to an action on a bond which indemnified an employer against the default of a collector, and which provided for notice to the surety company by registered letter, that the registered letter was not sent as required by the contract, where actual notice was promptly given of the embezzlement to the State agent of the surety, who promptly notified his principal. *Crystal Ice Co.* v. *United Surety Co.*, 102.

2. The employer was justified in acting on the advice of the State agent and retaining the collector in his employ, notwithstanding a proviso in the contract against such retention after a default, where it appeared that the advice given was known to the surety and it forwarded blank proofs of loss and received the proofs without objection. *Id.*

3. A bond for indemnity against loss through the default of an employé makes the surety an insurer in all essential particulars and subject to the same rules as fire and life insurance companies. *Id.*

4. Evidence that money had been taken by the employé, is insufficient to establish as a defense to an action on the indemnity contract that his accounts had not been examined weekly, as required by the contract. *Id.* 103.

5. The surety upon a bond given to secure laborers and materialmen in the construction of public works (3 Comp. Laws, § 10743), is not liable for labor and materials provided for the benefit of the contractor in repairing his pumps and machinery. *City of Alpena, for use of Besser*, v. *Title Guaranty & Surety Co.*, 329.

6. Labor performed for a contractor engaged in the construction of a public work, and consisting of time spent in raising a sunken dredge, is in the nature of a repair to machinery of the contractor, and is not secured by the statutory bond under 3 Comp. Laws, § 10743. *City of Alpena, for use of O'Brien*, v. *Title Guaranty & Surety Co.*, 334.

7. A recovery may not be had upon the statutory bond given by a contractor engaging in the construction of public buildings and works, for the value of cartage of supplies to and from a dredge which was used in the performance of the contract. *City of Alpena, for use of Beaudrie*, v. *Murray Co.*, 336.

See CORPORATIONS (2); EVIDENCE (7); MUNICIPAL CORPORATIONS (5).

PRIVATE ROADS—See EASEMENTS (8-12).

PRIVILEGED COMMUNICATIONS—See EVIDENCE (5, 11).

PROBABLE CAUSE—See MALICIOUS PROSECUTION (2).

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PROBATE—See WILLS (1).

PROBATE COURTS—See CONSTITUTIONAL LAW (4); ESTATES OF DECEDENTS (4).

PROCEDURE—See CRIMINAL LAW (10).

PROCESS—See ACTION (1, 3); ATTACHMENT (1).

PROFITS, LOSS OF—See DAMAGES (5).

PROOF—See INTOXICATING LIQUORS (1); TRIAL (8).

PROXIMATE CAUSE—See MASTER AND SERVANT (13).

PUBLICATION—See ATTACHMENT; WILLS (3).

PUBLIC BUILDINGS—See INJUNCTION (11).

PUBLIC GROUNDS—See EASEMENTS (6).

PUBLIC IMPROVEMENTS—See CONTRACTS (2); EMINENT DOMAIN (4); MUNICIPAL CORPORATIONS (2).

PUBLIC OFFICERS—See EMBEZZLEMENT (1-3, 5-7); MANDAMUS (4); MUNICIPAL CORPORATIONS (3); QUO WARRANTO (1); TAXATION (1-3).

PUBLIC POLICY—See CANCELLATION OF INSTRUMENTS (2).

PUBLIC SAFETY—See EVIDENCE (21); LANDLORD AND TENANT (6-8).

PUBLIC WORKS—See MUNICIPAL CORPORATIONS (5); PRINCIPAL AND SURETY (5-7).

PURCHASER FOR VALUE—See EVIDENCE (12).

PURE FOOD LAWS—See FOOD; STATUTES.

QUIET ENJOYMENT—See DEEDS (10, 12).

QUIETING TITLE—See REFORMATION OF INSTRUMENTS (5).

QUO WARRANTO.

1. A petition for leave to file an information in the nature of a quo warranto against a township supervisor should be sufficiently clear and definite as to facts to make out a clear case of right, and should not state conclusions. *Boucha* v. *Alger Circuit Judge*, 610.

2. The granting or withholding leave to file an information in the nature of a quo warranto is discretionary. *Id.*

3. The law requires a precise and positive showing before the appellate court will interfere in such proceeding. *Id.*

RAILROAD COMMISSION—See MANDAMUS (7).

RAILROADS.

The provisions of 2 Comp. Laws, § 6336, that the vendor and

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RAILROADS—Continued.

vendee of railroad equipment or rolling stock may provide by agreement for reservation of title to the property, should be construed in connection with 2 Comp. Laws, § 6426, by which after-acquired property becomes subject to a prior mortgage upon the rolling stock and equipments and other property, and the phrase "rolling stock and equipments" in the one section has the same meaning as "equipment or rolling stock" in the other; and the statutes so construed make a trust mortgage on the entire property a prior lien upon machinery furnished for the railway power house, over the rights of such vendor under a contract reserving title. *Detroit Trust Co.* v. *Detroit, etc., Ry.*, 443.

See CARRIERS; CORPORATIONS (6); DAMAGES (1); EVIDENCE (3); FRAUD (2); MANDAMUS (7); MASTER AND SERVANT (2–4); MECHANICS' LIENS (4); NEGLIGENCE (7).

RAPE.

Evidence of a subsequent offense is not admissible after the introduction of evidence fixing the time and offense relied on in a prosecution for statutory rape. *People* v. *Nichols*, 355.

See CRIMINAL LAW (5); EVIDENCE (19, 20).

RAVISH—See EVIDENCE (15).

REAL PROPERTY.

A life tenant who omits to perform his duty to pay the interest on a mortgage covering the premises, and who obtains a conveyance from the purchaser at the foreclosure sale, holds the property subject to the rights of his minor children who own the remainder, and their interest is not divested by a transfer of the realty to a son who had notice of the facts. *McCall* v. *McCall*, 144.

See BOUNDARIES (1, 3); DEEDS; EASEMENTS; EJECTMENT; EQUITY (6, 7); EQUITY JURISDICTION (2); ESTATES OF DECEDENTS (4); EXECUTORS AND ADMINISTRATORS (2); FRAUDS, STATUTE OF (1); INJUNCTION (10); SPECIFIC PERFORMANCE.

RECEIVERS—See LIMITATION OF ACTIONS.

RECORD—See APPEAL AND ERROR (1, 3).

RECORDS OF COMMON COUNCIL—See EVIDENCE (21).

REFORMATION OF INSTRUMENTS.

1. A lessee who deliberately signs a writing which restricts his use of rented premises to office purposes only, and prohibits the use for any business deemed extra hazardous on account of fire, when he was doubtful at the time whether it would permit him to conduct his business therein, and relied upon the unauthorized statement of the bookkeeper of the lessor that the lessor knew the intended purpose, and of the real estate agent conducting the negotiations, that there would be no trouble, is not entitled to reformation in equity upon a cross-

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REFORMATION OF INSTRUMENTS—Continued.

bill claiming mistake or fraud. *Campau* v. *National Film Co.*, 169.

2. In such case the written instrument must prevail over prior oral agreements. *Id.*

3. On a bill to redeem from tax deeds held by a defendant to whom the land owned by complainants had been conveyed through a mistake of a prior grantor in complainant's chain of title, the equitable right to reform the deed is enforceable in favor of the complainants who made no claim through the erroneous instrument, but obtained title through a mortgage foreclosure and mesne conveyances from the grantor who committed the error. *Nisbett* v. *Milner*, 337.

4. Reformation is not barred by the defense that the complainants are not in a position to rectify the error by conveying the land which the deed should have conveyed, where the mistake had been in effect corrected, by a subsequent conveyance to the grantee in such deed, of the property which the parties intended to convey. *Id.*

5. While a complainant in a bill to remove a cloud from the title of occupied lands must show that he is in possession or the defendant is not, such want of possession does not preclude relief in a case coming under another recognized rule of equity jurisdiction. *Id.*

See CANCELLATION OF INSTRUMENTS (1); EQUITY JURISDICTION.

REFUSAL TO COHABIT—See DIVORCE (3).

REGULATIONS—See DEATH BY WRONGFUL ACT (2).

REMAINDERS—See EQUITY (7); REAL PROPERTY.

REMEDIES—See MANDAMUS (3); TAXATION (5).

REMOVAL OF CLOUD—See REFORMATION OF INSTRUMENTS (5).

RENTS—See DEEDS (5).

REPEAL BY IMPLICATION—See MUNICIPAL CORPORATIONS (6).

REPLEVIN — See DAMAGES (2); FRAUDULENT CONVEYANCES; MALICIOUS PROSECUTION (1); SALES (12, 16); TRIAL (8).

REPUTATION—See EVIDENCE (15, 16); TRESPASS TO PERSON (2).

RESCISSION—See FRAUD (3); INSURANCE (4); SALES (8, 9, 12).

RESERVATION OF TITLE—See RAILROADS; SALES (3, 6).

RES GESTÆ—See EVIDENCE (3, 26); STREET RAILWAYS (7).

RESIDENCE OF TESTATOR—See WILLS (1).

RES JUDICATA—See EMINENT DOMAIN (3); ESTATES OF DECEDENTS (1); JUDGMENT.

RESTRAINT OF TRADE—See CANCELLATION OF INSTRUMENTS (2).

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RETURN OF JUSTICE—See CRIMINAL LAW (14); JUSTICES OF THE PEACE (2).

REVOCATION—See WILLS (4).

RIGHT OF WAY—See EASEMENTS.

RIGHTS OF ABUTTING OWNER—See HIGHWAYS AND STREETS (1).

RIPARIAN RIGHTS—See BOUNDARIES (1, 3).

RIVERS AND LAKES—See BOUNDARIES; CONSTITUTIONAL LAW (3).

ROLLING STOCK—See RAILROADS.

ROOF, RIGHT TO USE OF—See LANDLORD AND TENANT (3).

RULES—See MASTER AND SERVANT (4).

SAFE PLACE—See MASTER AND SERVANT (5, 7, 10.).

SALE OF REAL PROPERTY—See ESTATES OF DECEDENTS (4); FRAUDS, STATUTE OF (1).

SALES.

1. Machines furnished under a contract which specified that the design, material, and labor should be the best of the several kinds for their respective uses, and that the workmanship and material should be strictly first class for the purpose and in the place where used, and that the final payment was to be made thirty days after successful operation, are required to operate successfully for defendant's purpose known to the seller, before payment can be compelled in an action of assumpsit. *Bellows Falls Machine Co.* v. *Munising Paper Co.*, 45.

2. Upon the default by a vendee of personal property in making specified payments, the vendor is entitled to possession on declaration of forfeiture. *National Cash Register Co.* v. *Richards*, 128.

3. The seller may elect, under a conditional contract of sale reserving title, to waive the default and continue the contract in force *Id.*

4. A letter advising the purchaser that the contract of sale will be held by an attorney until a specified date, after which possession will be demanded, is an election to waive the default until the date named, and continue the contract in force. *Id.* 129.

5. No new consideration is required to render such waiver valid. *Id.*

6. A sale of personal property with reservation of title to the seller, gives the purchaser only the right to possession, but no lien or special property in the subject-matter. *Id.*

7. A purchaser of shrubbery who cancels the order after the seller has dug up and set aside the property for him, is not

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SALES—Continued.

liable for the entire purchase price, but for damages for the breach merely. *Mayo* v. *Latham*, 136.

8. After the constructive delivery of timber from seller to buyer, the defendant having failed to pay for it and a suggestion being made that a new contract be executed to meet the situation, the parties failed to come to an adjustment, and the letters between them including their negotiations are *held* not to amount to a rescission of the original contract by plaintiff. *Watson* v. *E. E. Naugle Tie Co.*, 174.

9. Rescission of a contract of sale is not shown by testimony that the seller demanded that defendant either pay for or release the timber, and the latter's agent stated they would see about it, and the seller could not get them to release the property, but that the defendant later informed a prospective purchaser of the timber that he might take it and that the defendant made no claim to it. *Id.*

10. Testimony is admissible under a notice in defense of an action for the price of goods sold, admitting delivery and acceptance and charging that the contract was secured by fraud; it being possible that the fraud was discovered after acceptance. *Providence Jewelry Co.* v. *Bailey*, 285.

11. Representations of an agent who sells goods under a written contract, that the terms of the agreement give the purchaser fifteen days in which to accept the property, do not constitute such representations of existing material facts as to constitute an inducement on which reliance might be placed, and evidence of the statements is incompetent to vary the terms of the agreement. *Id.*

12. That the purchasers of lumber represented it was a cash deal, but did not pay for the merchandise, and were hopelessly insolvent, that the lumber was immediately turned over to a creditor of the purchaser, at a price lower than cost, and that the purchaser had no reasonable expectation of being able to pay, tends to show a fraudulent intent which gives the seller a right to rescind and recover the property. *Weidman* v. *Phillips*, 380.

13. A charge to the jury that to constitute fraud the buyer must have had no reasonable expectation of being able to pay the price within the lifetime of the account, is not error and is unduly favorable to the defendants when coupled with further instructions that an intention not to pay, or to cheat and defraud the owner, must have existed. *Id.*

14. It was not error for the trial court to refuse a request to instruct the jury that the defendants' contention was correct, and that if they, in good faith, intended to continue in business, such intention would legally rebut any inference that they did not intend to pay for the lumber. *Id.*

15. Under a contract of sale providing that the purchaser should have "two per cent. off within ten days" or "two per cent. off net bill for cash on arrival of car" the question of the time when the account matured, was not a question of fact for the jury. *Id.*

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SALES—Continued.

16. Under an agreement which provided that the consignee of the plaintiff's pianos might sell for cash or to responsible purchasers on credit, reserving a lien, no title passed to a purchaser who paid no cash but exchanged other property for the piano, in the absence of evidence tending to show that plaintiff is estopped to recover the property. *Starr Piano Co.* v. *Morrison*, 583.

17. Possession of personalty is merely *prima facie* evidence of ownership. *Id.*

18. The terms of a contract which clearly and explicitly give the consignee of a piano authority to sell, may not be extended by proof of a custom of piano dealers to make exchanges. *Id.* 584.

See ATTACHMENT (2); DAMAGES (2); ESTOPPEL (2); FRAUD (1); PLEADING; USURY.

SAUSAGE—See FOOD.

SAVING QUESTIONS FOR REVIEW — See APPEAL AND ERROR (3, 10); EVIDENCE (6, 23); LAND CONTRACTS (2).

SCAFFOLDING—See MASTER AND SERVANT (1).

SCIENTER—See PRINCIPAL AND AGENT (2).

SCOPE OF EMPLOYMENT—See MASTER AND SERVANT (2).

SEISIN—See DEEDS (9).

SELF DEFENSE—See TRESPASS TO PERSON (2, 3).

SELF-SERVING DECLARATIONS—See INSURANCE (6).

SENTENCE—See CRIMINAL LAW (8, 9).

SET-OFF AND RECOUPMENT—See LANDLORD AND TENANT (9).

SHERIFF'S SALE—See ATTACHMENT (2).

SIDEWALK IMPROVEMENTS — See MUNICIPAL CORPORATIONS (1).

SIGNATURE, GENUINENESS OF — See EVIDENCE (18); PRINCIPAL AND AGENT (3).

SIGNS ON LEASED BUILDING — See LANDLORD AND TENANT (4, 5).

SPECIAL ASSESSMENTS—See EVIDENCE (2); MUNICIPAL CORPORATIONS (1); TAXATION (3-5).

SPECIFIC ENFORCEMENT—See CONTRACTS (1).

SPECIFIC PERFORMANCE.

An oral contract of a parent not to convey real property owned by him, but to permit the land to descend to his heirs, in consideration of the executed conveyance by his wife to him of other real property, is enforceable in equity against a

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SPECIFIC PERFORMANCE—Continued.

second wife, to whom he deeded the real property without consideration, in violation of his parol agreement, of which she had notice, relief in equity not being barred by the statute of frauds. *Ruch* v. *Ruch*, 231.

STATE LEGISLATURE—See CONSTITUTIONAL LAW (10); MUNICIPAL CORPORATIONS (6).

STATEMENT TO ATTORNEY—See MALICIOUS PROSECUTION (2).

STATE TREASURER—See EMBEZZLEMENT.

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATIONS, STATUTE OF.

STATUTES.

In construing Act No. 193, Pub. Acts 1895, 2 Comp. Laws, § 510 *et seq.*, the court will adopt the meaning of the word sausage which is generally understood and intended, not a meaning peculiar to the trade or to certain manufacturers. *Armour & Co.* v. *State Dairy & Food Com'r*, 1.

See CONSTITUTIONAL LAW (3–6, 11–13); CORPORATIONS (2–4); CRIMINAL LAW (8); EASEMENTS (10); EMBEZZLEMENT (4); ESTATES OF DECEDENTS (4); EVIDENCE (17); EXECUTORS AND ADMINISTRATORS (2); FOOD (1, 2); HIGHWAYS AND STREETS (1); INSURANCE (11); INTOXICATING LIQUORS (2); JUSTICES OF THE PEACE (3); MANDAMUS (1); MECHANICS' LIENS (4); MUNICIPAL CORPORATIONS (6); NEGLIGENCE (4, 11); RAILROADS; STREET RAILWAYS (1); TAXATION (9); VENUE (3); WITNESSES.

STATUTORY CONSTRUCTION—See CONSTRUCTION OF STATUTES.

STATUTORY OFFENSE—See EVIDENCE (20); INDICTMENT AND INFORMATION; RAPE.

STAY OF PROCEEDINGS—See APPEAL AND ERROR (11, 12); INJUNCTION (7).

STOCK AND STOCKHOLDERS—See EMBEZZLEMENT (5); FRAUD (3); LIMITATION OF ACTIONS.

STREET RAILWAYS.

1. A consolidation of domestic street and electric railways is not authorized by Act No. 143, Pub. Acts 1901, which applies to the consolidation of companies in adjoining States with corporations in Michigan. *Green* v. *Michigan United Rys. Co.*, 58.

2. A consolidated corporation is estopped to set up the invalidity of its consolidation as against the claim of a creditor of one of the constitutent corporations. *Id.*

3. A general allegation that the defendant consolidated with the corporation which was indebted to the plaintiff is sufficient to permit a recovery against the consolidated company. *Id.*

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STREET RAILWAYS—Continued.

4. A street sweeper working on a street car track, in the midst of a noise sufficient to deaden the sound of the gong of a car, is guilty of contributory negligence for placing reliance on his hearing only, and cannot recover for injuries sustained because of the motorman's failure to stop a car, which approached from the rear, running at ten miles an hour, and on which the gong was sounding. *Stenzhorn* v. *City Electric R. Co.*, 82.

5. In the operation of cars on the public street it is not negligence to assume that a person standing on the track will hear the usual signals, until it becomes apparent that he is paying no attention to them. *Id.*

6. It is error to submit to the jury the question of defendant's negligence in backing the car off the injured street sweeper, dragging him back several feet, where the evidence showed that the car backed because the current had been reversed to avoid the collision. *Id.* 83.

7. Advice to the person operating the car, given after the accident, is inadmissible. *Id.*

See CARRIERS (2); DEATH BY WRONGFUL ACT; MANDAMUS (5).

STRIKING OUT PORTIONS OF ANSWER — See EMINENT DOMAIN (5).

SUBCONTRACTORS—See CONTRACTS (2).

SUBSCRIBING WITNESSES—See WILLS (5).

SUPREME COURT — See APPEAL AND ERROR (9, 12); ATTORNEY AND CLIENT (3).

SURETIES' LIABILITY—See EVIDENCE (24).

SURVIVAL OF ACTION—See DEATH BY WRONGFUL ACT.

TAXATION.

1. A void tax for the expenses of fence viewers and repairs to a partition fence under 1 Comp. Laws, § 2415 *et seq.*, paid by the owner to whom it was assessed to the township treasurer under protest, is recoverable in assumpsit against the collecting officer in person. *Brown* v. *Warner*, 274.

2. A tax collector is protected from all personal liability in collecting a tax under a warrant fair on its face. *Id.*

3. Assessments for special or local purposes, not being within the rule, an action lies against the collector personally, where no other remedy at law exists. *Id.*

4. In an equitable action for money had and received, brought against a village to recover the amount of a special paving tax paid under protest, the plaintiff can only recover the excess above the amount properly assessed against his property. *Long* v. *Village of Dundee*, 320.

5. A suit will not lie to recover taxes paid when the only com-

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TAXATION—Continued.

plaint that can be made is that the proceedings in their levy and collection have been irregular, the remedies by review or appeal being adequate to afford redress. *Id.*

6. Under a statute limiting the amount of a tax to five per cent. of the valuation of any parcel assessed, and under proceedings which authorized the collection of one-fifth of the entire special tax for paving the first year, an installment of $18 is payable on the first assessment by an owner of premises assessed at a valuation of $1,800, who cannot, however, recover, where a tender had been made of the excess collected. *Id.* 321.

7. The portion of an excessive levy for a village paving tax, consisting of the fees and expense of making a levy by the tax collector, is not recoverable from the village in the absence of evidence that such amount was reported to the village or became a part of the public fund. *Id.*

8. The amount of personal property of an estate subject to inheritance tax under Act No. 195, Pub. Acts 1903, is determined by deducting mortgage and other debts from the personal estate. *In re* Fox's Estate, 154 Mich. 5 (117 N. W. 558), overruled. *In re Fox's Estate*, 420.

9. The form provided by Act No. 195, Pub. Acts 1903, which indicates that debts against the estate secured by mortgage are to be deducted from real property of the estate, does not change the effect of other sections of the law. *Id.*

See CONSTITUTIONAL LAW (7, 9-11); EVIDENCE (2, 17); JUDGMENT; MANDAMUS (1, 2); MUNICIPAL CORPORATIONS (1); REFORMATION OF INSTRUMENTS (3).

TAX STATEMENT—See EVIDENCE (17).

TELEGRAPHS AND TELEPHONES—See CORPORATIONS (5).

TENDER OF DEED—See LAND CONTRACTS (1, 3).

THEATERS—See LANDLORD AND TENANT (6-9).

TITLE—See EXECUTORS AND ADMINISTRATORS (2); INSURANCE (7, 12, 14); TRIAL (8).

TITLE OF ACT—See CONSTITUTIONAL LAW (13).

TITLE TO CROPS—See LANDLORD AND TENANT (1, 2).

TITLE TO PERSONAL PROPERTY—See SALES (17).

TORNADO INSURANCE—See INSURANCE (12, 13); PRINCIPAL AND AGENT (5).

TORTS—See DAMAGES (4).

TOWNSHIP OFFICERS—See MANDAMUS (4); TAXATION (1).

TRADE MEANING—See STATUTES.

TREATIES—See CONSTITUTIONAL LAW (1, 2).

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TREES—See HIGHWAYS AND STREETS (1, 2); MALICIOUS PROSECUTION (2).

TRESPASS—See LANDLORD AND TENANT (8).

TRESPASS ON THE CASE—See DAMAGES (4).

TRESPASS TO PERSON.

1. In an action of trespass for throwing stones at the plaintiff and injuring him and for an assault with a shovel, the evidence showing that the plaintiff did not get out of the rig in which he rode, it is not a justification that the plaintiff drove out of the beaten track upon that portion of the highway cultivated by the defendant. *Ulmer* v. *Seelman*, 253.
2. Where a party claims in defense to an action of trespass for an assault that he was afraid of the plaintiff, because of the latter's reputation and quarrelsome disposition, it is error to exclude questions, on cross-examination of the defendant, which tend to show by specific instances his own disposition and reputation as to the same matters. *Id.*
3. Testimony is improperly excluded which tends to show that the defendant bore ill will towards the plaintiff and his brother. *Id.*
4. A question by defendant's attorney as to the defendant's condition and appearance since the death of his son by drowning attempts to introduce improper evidence. *Id.*
5. Error was committed by the trial judge in charging the jury, as requested by the defendant, that the owner of land along a highway is entitled to its use to the center, subject to the usual rights of travel by the public, under evidence which showed that the defendant was not attempting to eject plaintiff as a trespasser or to defend his premises against a trespass. *Id.*

See EVIDENCE (15).

TRESPASSERS—See NEGLIGENCE (5, 6).

TRIAL.

1. The trial court may properly refuse to give to the jury instructions upon abstract questions which could in no way aid the jury in coming to a conclusion as to the facts. *Fors* v. *Fors*, 156.
2. A charge which informs the jury that if a notary who testified in the case made certain alterations in a deed after its execution, he is guilty of forgery and perjury, erroneously emphasizes the opinion of the trial court upon a question of fact, and omits the theory that the notary might be mistaken in his recollection, or have believed he was entitled to change the instrument, or that he might have attempted to correct a supposed mistake in the conveyance. *Id.* 157.
3. Improper conduct of a party with the jury, known to the other party to the action during the trial and not brought to the attention of the trial judge by objection or otherwise, is not ground for a reversal. *Ulmer* v. *Seelman*, 253.

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TRIAL—Continued.

4. In an action for injuries caused by defendant's alleged negligence, the court, in reviewing a judgment on a verdict directed for defendant, must give to the plaintiff's evidence the most favorable construction it will bear in his favor. *Schmidt* v *Michigan Coal & Mining Co.*, 308.

5. The exclusion of testimony, on cross-examination of the plaintiff, offered to show a conspiracy by proving an agreement to divide the proceeds with one witness, is not prejudicial error where the question had been previously asked and answered and the purpose was not indicated to the trial court. *Sisson* v. *Lampert*, 509.

6. Incorrect statements of the law made by the plaintiff's attorney in argument were cured by the prompt action of the trial judge. *Reese* v. *Detroit United Railway*, 600.

7. The action of the trial judge in asking of a witness who advised the landlord as to his exemptions and who had also acted as attorney for plaintiff, as to his theory of the right to exemptions, was not prejudicial, in view of the charge which instructed the jury that the acts of such witness were not binding on the plaintiff except to show the acts done by them in conjunction. *Grand Rapids Brewing Co.* v. *Pettis*, 679.

8. The plaintiff's right to a judgment, in an action of replevin involving its title to the property, could not be affected by the defendant's omission to prove that the costs for which the execution was issued were properly taxed. *Id.*

9. In cases which involve the good faith of a party, the extent of cross-examination bearing on the question is discretionary. *Id.*

10. Inquiries as to immaterial matters, which are answered favorably to the appellant and not objected to at the time or presented on motion for a new trial, do not constitute reversible error. *Id.*

See APPEAL AND ERROR (10); CRIMINAL LAW (1, 5); EVIDENCE (6, 15, 16, 18); HUSBAND AND WIFE; INTOXICATING LIQUORS (4, 7); NEGLIGENCE (9); SALES (14).

TROVER AND CONVERSION—See ATTACHMENT (2); DAMAGES (3); ESTOPPEL (1); EXECUTION.

TRUSTEE IN BANKRUPTCY—See PARTNERSHIP (5).

TRUST MORTGAGES—See FRAUD (2).

TRUSTS.

To create a trust by a parol declaration, where the donor retains the property, it must be executed by acts and words of a clear and unequivocal character, constituting something more than a mere declaration of intention. *Mitchell* v. *Bilderback*, 483.

See FRAUDS, STATUTE OF (2).

UNDUE INFLUENCE.

1. Undue influence is largely a matter of inference from facts

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UNDUE INFLUENCE—Continued.

and circumstances, including the character, disposition and mental condition of the person influenced, and the opportunity to influence him. *Andrews* v. *Lavery*, 27.

2. A finding of undue influence is sufficiently supported by testimony that the grantor left his wife, who was insane and had only a small amount of property, without any of his estate for her support, and transferred it all to his daughter who was married and sufficiently provided for, that he was enfeebled by disease, was away from the wife and within the influence of his daughter, that no ill feeling towards his wife existed, and no other means of influencing him to make the transfer of insurance to the daughter were disclosed. *Id.*

See WILLS (6).

USER—See ADVERSE POSSESSION (1, 2); EASEMENTS (1–4).

USURY.

1. Every written agreement to pay interest in excess of the legal rate, however well disguised, is in violation of law and usurious. *Rosen* v. *Rosen*, 72.

2. A contract by which one partner agrees to purchase the interest of another and to pay him an amount computable under the terms of the agreement, and, if payment shall not be made in a given time, to pay an additional sum, more than seven per cent. of the principal, is void as usurious. Act No. 207, Pub. Acts 1899, 2 Comp. Laws, § 4856 *et seq.* *Id.*

VENDOR AND PURCHASER—See LAND CONTRACTS (1, 3); RAILROADS; SALES (16, 18).

VENUE.

1. On a motion for a change of venue alleging local prejudice, which was denied by the finding and return of the circuit judge, the framing of an issue of fact will not be compelled by writ of mandamus, and the trial delayed until its determination. *Grand Rapids, etc., R. Co.* v. *Cheboygan Circuit Judge*, 210.

2. Setting a cause for trial on a day certain at the relator's request operates as a waiver of the right to review a previous refusal to grant a change of venue. *Id.*

3. The statutes authorizing a change of venue on motion do not require the granting of the motion as an imperative right. Act No. 67, Pub. Acts 1909. *Id.*

See ACTION; WILLS (1).

VICIOUS CHARACTER—See ANIMALS; PRINCIPAL AND AGENT (2).

VOLUNTARY CONVEYANCE—See LANDLORD AND TENANT (2).

WAIVER—See INSURANCE (8, 9, 14); PRINCIPAL AND SURETY (2); SALES (3–5); VENUE (2).

WALLS, RIGHT TO USE OF—See LANDLORD AND TENANT (4).

WARNING SIGNALS—See NEGLIGENCE (7).

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WARRANTY—See SALES (1).

WATERS AND WATERCOURSES—See EASEMENTS (7).

WAYS OF NECESSITY—See EASEMENTS (8–12).

WILLS.

1. The will of a person who is domiciled in another State at the time of his death must be admitted to probate in the State of the testator's domicile, before it can be admitted to probate here. *In re Corning's Estate*, 474.

2. A will executed by the testator in due form and properly witnessed, may not be shown to be inoperative by testimony as to declarations of the deceased that he did not intend it to be a final disposition of his estate. *In re Kennedy's Estate*, 548.

3. No publication of a will is required to give it effect in Michigan. *Id.*

4. Placing the will out of the possession of the testator does not place it beyond his control to revoke by another instrument. *Id.*

5. The mere failure of a subscribing witness to remember whether or not the will was subscribed by him in the presence of the other witness does not raise a question of fact for the jury, where he states that he has no recollection at all about the transaction, but that the signature is genuine. *Id.*

6. Statements made by the testator that he was being hounded to make the will are inadmissible to prove undue influence. *Id.*

7. A deed containing a clause providing that it shall not become operative until the death of the grantor, when it is to have full force and effect, interpreted in the light of surrounding circumstances indicating such intent, is a testamentary disposition of property, revocable by a subsequent will. *Moody* v. *Macomber*, 657.

8. No estate passes with the delivery of a will to the devisee. *Id.*

See EXECUTORS AND ADMINISTRATORS (2).

WITNESSES.

The claimant's wife who cooked food for her father and assisted in caring for him is not an agent of the claimant in making or continuing the contract, under Act No. 30, Pub. Acts 1903, which excludes the testimony of the agent. *Weessies* v. *Van Dyke's Estate*, 180.

See CRIMINAL LAW (4, 7); EVIDENCE (17); TRIAL (9).

WORDS AND PHRASES — See CONSTITUTIONAL LAW (8); CONTRACTS (2); FOOD (2, 3); RAILROADS; STATUTES.

WORK AND LABOR—See ESTATES OF DECEDENTS (3).

WRIT, NATURE OF—See APPEAL AND ERROR (7).

WRONGFUL SALE OF CORPORATE ASSETS — See CORPORATIONS (6).

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